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PRECEDENTS,

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Drafts of Actual Practice;

WITH

GENERAL COMMON FORMS AND VARIATIONS

ADAPTED TO ALL THE CIRCUMSTANCES USUALLY OCCURRING;

FORMING A

SYSTEM OF CONVEYANCING;

WITH

DISSERTATIONS, AND PRACTICAL NOTES.

BY THE LATE

W. M. BYTHEWOOD, Esq.

BARRISTER AT LAW.

The Second Edition,

CORRECTED FROM THE LATE EDITOR'S COPY, WITH ADDITIONAL PRECEDENTS AND NOTES,

By THOMAS JARMAN, Esq.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

VOL. III.

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It was my intention not to have given any Index until the termination of the Work: but there having been a general wish expressed for Indices to the Precedents and Notes, as the different Volumes are completed, my Friend, Mr. Arthur Edwards, has kindly commenced the undertaking. Therefore, Indices to the three first Volumes will be annexed to this Volume; and to each of the subsequent Volumes there will be annexed Indices to the Precedents and Notes contained in it.

The title Annuity has been in appearance considerably lengthened by the introduction of many Notes on various subjects relating to Conveyancing generally, which might therefore have been inserted under other titles with equal propriety.

I must again return my thanks to many of the Profession, for those additional and unexpected acts of disinterested kindness in relation to this Work, which I have received since the Publication of the first Part.

W. M. Bythewood.

44, Lincoln's Inn Fields,
3d November, 1823.

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gagor and mortgagee in possession.

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vanced): J. B. P., the only acting Trustee, having paid various Sums to his Brothers in part of their Shares, and having delivered to C. P. part of the Farming Stock, &c., and there being a Dispute as to the Sum to be allowed by C. P.: and J. B. P. and T. P. having had Dealings together in Trade, as to which Disputes had arisen, all the Parties had agreed to refer the Executorship Accounts, and all other Differences between them, to the Award of the two Arbitrators, or an Umpire then named by the Parties; and the Parties having enlarged the Time for the Arbitrators making their Award; and it appearing to them, that the whole of the Real and Personal Estates had been converted into Money, (except a Piece of Copyhold Land, and a Leasehold Dwelling House), That J. B. P. shall, within one Month, surrender to J. G. and F. his Wife, in Fee, the Piece of Copyhold Land; the Value whereof the Arbitrators have deducted from their share: that J. B. P. shall, within one Month, assign to E. P. the Leasehold Dwelling House; and that E. P. shall be entitled to the Rents from Lady-Day last; the value whereof the Arbitrators have deducted from her Share: that J. B. P. shall forthwith pay G. P., I. G., and F. his Wife, S. P. and T. P., several specific Sums: that J. B. P. shall forthwith give E. P. a Bond, with two Sureties named, for securing her Share, with Interest, within Twelve Months: that J. B. P. shall forthwith give to R. P. an Infant, or to her Appointee, a Bond, securing her Share, with Interest, within Three Years; the Interest to be paid half yearly to the Mother, for R. P.'s use: that the Bonds shall be prepared at J. B. P.'s Expense: that C. P. shall forthwith pay J. B. P. the Sum found to be due from him, after deducting his Share under the Will: that J. B. P. shall forthwith pay the Expenses of the Reference and Award, the Arbitrators having made him an allowance for that purpose: that all Parties entitled to receive Money under the Award, shall give proper Receipts; and, if required, give a General Release to the Person paying such Money, but at his Expense: Proviso, that if the

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cause his own Bill to be dismissed, with Costs to be taxed, and to be paid by him to the Plaintiffs: that all Proceedings in Law and Equity shall be stayed: that the Defendant shall pay the Plaintiffs, at, &c. the Sums awarded, with the Costs of both Actions, and the Costs of Reference and Award; the Costs to be taxed. Recital, that, pending the Reference, an Exchequer Bill for 400*l.* has been purchased with Defendant's Money, and deposited to abide the Event of the Award; Further Award, that the Exchequer Bill, and all other Bills received in Exchange for it, be sold by 10th December; the Produce, and all Benefit of the Bills, to be paid to the Plaintiffs as Part of the Money and Costs awarded: That the Plaintiffs shall accept the Money and Costs awarded, in full of all Demands, as Executors, upon the Defendant. *Page* 119

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Award under an Order of Nisi Prius, in the Common Pleas, whereby the Jury was directed to find a Verdict for the Plaintiff for —— Pounds Damages, subject to a Reference of all Matters in Difference; so as the Arbitrator made his Award by a given Day, or any other Day to which he should enlarge the Time: and it was ordered, that the Arbitrator might examine the Parties upon Oath; and that the Parties and Wit-

nesses might be sworn before a Judge of the Court: that the Parties should produce before the Arbitrator, all Books, &c.: that the Costs of the Suit should abide the Event of the Award, and the Costs of Reference be in the Arbitrator's Discretion:—That the Plaintiff had no Cause of Action: that instead of the Verdict and Damages for the Plaintiff, a Verdict be entered for the Defendant: and that the Plaintiff and Defendant shall bear their own Costs of the Reference, and of the Award. - - *Page* 127

Award after an Action against a Sheriff, on a Reference of all Matters in Difference between the Parties, by a Judge's Order, pursuant to the Terms of an Agreement between the Parties, set forth in the Order, and reciting, that the Plaintiff claims a House, Furniture, &c., under a Bill of Sale, and an Assignment of the Lease: that another claims the Value of the Furniture under a *fi. fa.* on which the Furniture has been seized by the Sheriff, who has had joint Possession with the Plaintiff, being indemnified by Claimant: and the Agreement being that the Plaintiff shall have entire Possession; and the Claims referred to an Arbitrator; if he should determine that the Claimant is entitled to the Value, the Plaintiff undertakes to pay the same; if he should determine that the Plaintiff is entitled, the Arbitrator to award Damages to the Plaintiff, to be paid by the Claimant; the Costs of the Arbitration, &c., to be paid by him, who shall be declared not to be entitled; so as the Award be made by a given Day; but the Time was several times enlarged by the Court, with the Consent of the Parties; —That the Claimant had no Right to the Furniture, but that the Plaintiff was entitled: and that the Claimant pay the Plaintiff one Shilling Damages. 129

Under judge's order on agreement, of right to furniture and damages.

Award under a Judge's Order, that a Cause in the King's Bench should be referred to Arbitration; that the Costs of the Cause, Reference, and Award, should be in the Arbitrator's Discretion; and that the Arbitrator might examine the Parties and Witnesses on Oath, to

Under judge's order of payment to plaintiff, &c.

be sworn before a Judge of the Court, or a Commissioner: That the Defendant pay the Plaintiff, at &c., a certain Sum: that it be received by the Plaintiff, in full Satisfaction of all Matters referred: that each Party pay his own Costs of the Cause, and Reference; and that the Costs of the Award be paid equally.
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Under judge's order, of payment, general release, &c.

Award under a Judge's Order, whereby a Cause was referred to one Arbitrator; the Costs of the Action to abide the Event of the Award; the Costs of Reference to be in Arbitrator's Discretion; the Parties and Witnesses to be examined on Oath, to be sworn before a Judge of the Court, or a Commissioner; the Parties to produce all Books, &c., and the Order to be made a Rule of Court:—That the Proceedings in the Cause shall cease: that the Defendant shall pay the Plaintiff, or his Attorney, a certain Sum, in full of all Demands in the Cause: that on Payment thereof, the Plaintiff shall, if required, at the Defendant's Costs, execute a General Release: and that the Plaintiff and Defendant shall each pay his own Costs of the Reference, and of the Award. - 136

Under order by Lord Chancellor, of balance of account.

Award by an Umpire, under an Order by the Lord Chancellor, whereby a Chancery Cause was referred to the Solicitors for the Parties, who, in case of Difference, were to choose an Umpire; that the Balance due to the Defendant was 348*l.*: and 200*l.*, having been paid him by the Plaintiff, since the Order of Reference, that the Balance now is 148*l.* - - 139

No claim on bankrupt's assignees as to a ship, but plaintiff to prove a debt.

Award under an Order of Reference, that the Plaintiff has no Claim on the Assignees of a Bankrupt, in respect of a certain Ship; or for any Monies lent the Bankrupt, or expended on the Ship: that the Plaintiff never had any Title to the Ship: that the Plaintiff shall on demand deliver to the Assignees all Papers relating to the Ship: and that the Assignees permit the Plaintiff to prove a certain Sum under the Commission, as a Debt due from the Bankrupt. 140

Award on a former Award being sent back to the Arbitrator for his Reconsideration; reciting an Order of Nisi Prius, whereby the Jury was ordered to find a Verdict for the Plaintiff, with Costs, subject to a Reference of all Matters in Difference in the Cause: that the Costs of the Cause should abide the Event of the Award: that the Costs of the Reference should be in the Arbitrator's Discretion: the Order afterwards made a Rule of the Court of King's Bench: several Enlargements of the Time for making the Award: that the Arbitrator ordered the Defendant to pay the Plaintiff a certain Sum: a Rule calling on the Defendant to shew Cause why an Attachment should not issue against him, for Non-performance of the Award: a Rule whereby the Rule to shew Cause was enlarged, the Defendant consenting to go before the same Arbitrator, who was to reconsider the amount of Damages; so as the Sum then Awarded should be invested in Exchequer Bills, and deposited at the Bank, in the Attornies' Names, and paid to the Plaintiff's Attornies either wholly or partly, according to the second Award: Enlargement of the last Rule, and of the Time for making the Award: the Costs of the further Reference and Award to be in the Arbitrator's Discretion: Confirmation of former Award: the Exchequer Bills to be delivered to the Plaintiff's Attornies; and the Defendant to pay the Plaintiff's Attornies the Costs of the Second Reference and Award; such Costs to be first taxed. - - - *Page* 143

Confirming former award, sent back for reconsideration.

Deed of Covenants by a Lessee, in Pursuance of an Award to farm during the Remainder of a Term according to the Course of Husbandry mentioned in a Schedule: and every Year during the Remainder of the Term to feed off at least Sixty Acres of Meadow or Pasture Ground; and at the End of the Term, to leave the Lands directed in the Schedule to be left in Turnips, in an Husbandry-like Manner, sown with Turnips, twice properly hoed; the Lessee being paid for the same at the Valuation of two Referees, or their Umpire: and at the End of the Term, to leave all the

Covenant to perform award as to course of husbandry, payments, &c.

Hay which shall arise in the last Year of the Term properly stacked; the Lessee being paid for the same at the Valuation of two Referees, or their Umpire: during the Remainder of the Term, to keep all the Covenants of the Lease (except such as are altered by these Presents); and in every respect to perform the Award; and to perform all such Acts, and make all such Payments, as are thereby directed to be done and made by him. - - - *Page* 149

Release of all demands except warrant of attorney. Release by a Mortgagee to a Mortgagor of all Actions and Demands, pursuant to the Direction of an Award; excepting a Warrant of Attorney, directed by the Award to be given by the Mortgagor to the Mortgagee. - - - - - 155

Release of all demands, except right to redeem. Release by a Mortgagor to a Mortgagee, of all Actions and Demands, pursuant to the Direction of an Award; excepting his Right to redeem, in the Manner prescribed by the Award. - - - 156

BANKRUPTCY.

For Bankruptcy, see title Trusts for Creditors.

BARGAIN AND SALE FOR A YEAR.

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To precede a release to prevent dower, or a release at common law. Bargain and Sale for a Year, adapted to a Common Appointment and Release, or a Release alone, to Uses to prevent Dower; or to a Release in Fee at Common Law. - - - - - 166

To precede a release of the possession or reversion by several, to uses to prevent dower, or to trustees, &c. Bargain and Sale for a Year, to precede a Release of an Estate in Possession, or of a Reversion or Remainder in Fee by several, either to Uses to prevent Dower, or to the Trustees of a Settlement, or to a Mortga-

gee, or Grantee of an Annuity, with Trusts for Sale, &c. - - - *Page* 169

Bargain and Sale for a Year, to precede a Release of an Estate for Lives, or for the Life of the Vendor, either to the Purchaser, or to the Trustees of a Settlement. 172 — To precede release of estate for lives or life.

Demise for a Year at Common Law by a Corporation, to be perfected by the Lessee's Entry previous to the Release; with an Attestation and Memorandum of Entry. - - - - - 175 — Demise at common law by a corporation.

Memorandum of Entry to be indorsed on the Lease for a Year. - - - - - 177 — Memorandum of entry.

BARGAIN AND SALE IN FEE, &c.

Bargain and sale in fee, &c.

For Bargain and Sale in Fee, &c., see titles Purchase and Recovery; and Index to the Precedents, title Bargain and Sale.

BILL OF SALE.

Bill of sale.

For Bill of Sale, see titles Mortgage, and Purchase; and Index to the Precedents, title Bill of Sale.

BOND.

BOND for Payment of Money and Interest, either in one Sum or by Instalments, and either with one, two, three, or more Obligors, or one, two, three, or more Obligees. - - - - 179 — Payment of money and interest.

Indorsement on a Bond, whereby the Obligor charges Freehold and Leasehold Premises with the Money and Interest secured by the Bond, and a Judgment: — Charge and agreement for mortgage on lands, indorsed on bond.

and Agreement that he, his heirs, &c., will, at the Obligee's Request, execute a Mortgage of the Premises. - - - - *Page* 198

Payment by four instalments. Bond from one Obligor to two Obligees, for Payment of 1,180*l.*, by Four Instalments; which the Obligees have agreed to take in full discharge of a Debt of 3,030*l.*, if the Instalments should be regularly paid, but not on Failure thereof: And Agreement by the Obligor, that if the Instalments are not duly paid, such Payments as shall be made shall only be a partial Discharge of the 3,030*l.* - - 199

Payment of principal at end of eight years, and interest in mean time. Bond from One to One, for Payment of the Principal Sum at the end of Eight Years; and for payment of Interest thereon in the mean time Quarterly: but if Default should be made in paying the Interest for Twenty-eight Days after each Quarterly Day, and after Demand, then the whole of the Principal and Interest to become immediately due: with a Proviso, that the Bond is given on condition, that Notice of every Assignment shall be given to the Obligor's Solicitors, or otherwise the Obligation not to become forfeited, nor any Assignee be entitled to demand Principal or Interest. - - - 203

Payment of money lent under testator's authority to two of his executors. Bond from Two Trustees and Executors of a Will to the Two other Joint Trustees and Executors, for the Payment of a Sum authorized by the Testator to be lent to the Obligors for a limited period; and for Payment of Interest in the mean Time, until Payment of the Principal; the Principal and Interest to be paid according to the Directions of the Will. - 205

To pay an annuity, pursuant to the condition of a bequest. Bond by two Legatees under a Will for Payment of an Annuity to the Widow of the Testator, for her Life, with a Proportional Part to the time of her Decease, pursuant to, and in Satisfaction of a Condition, on which the Bequest to the Obligors was made. 207

Contingent *post* *Post Obit* Bond, with a Surety, for securing a Sum to a

Purchaser thereof, if the Vendor should survive his Father or Grandfather. - - - 209 — *obit*, with surety.

Bond in consideration of a Release of a Debt for paying a Sum *Post Obit* the Obligor's Uncle, whether the Obligor be or be not then alive: the Sum secured being totally or partially redeemable in the *interim*. 227 — *Post obit* certain, but redeemable.

Memorandum of the Delivery of a *Post Obit* Bond to a Depositary, to be kept sealed during the Life of the Obligor's Uncle, unless previously redeemed; in order that the Obligor's Expectations from his Uncle may not be prejudiced. - - - 230 — Memorandum of delivering *post obit* bond to depositary.

Bond from Two Persons to London Bankers, to pay such Sums as the Bankers shall advance in answering Drafts or Bills to be drawn on them by a Mercantile Firm in the Country, not exceeding a certain Sum; And to indemnify the Bankers from all Losses, &c., on account of accepting and paying such Drafts or Bills. - - - - - 232 — To secure sums to be advanced in answering drafts, and to indemnify.

And see - - - 446, 460, 467

Bond from Two Sureties to London Bankers, for Payment of such Sums already, or to be hereafter advanced to Co-partners, with Interest, as the Co-partners shall not pay: but the Sureties to be only liable to a certain amount. - - - 235 — By sureties, to pay sums already or to be advanced.

Bond from Two Sureties to Merchants, who have agreed to supply a Tradesman with Goods, conditioned to be void on Payment by Principal; or in case of his Default, on Payment by Sureties, Six Months after Notice, of such Sums not exceeding 1,000*l*., as shall be due; but, if exceeding 1,000*l*., or if no such notice shall be given, then that Sum. - - 241 — Sureties for tradesman to a given amount.

Bond from an Attorney in the Country and Two Sureties to his Agent in London, for securing Money due, and to become due on account. - - 243 — Attorney and sureties to London agent.

To transfer stock after notice, and pay dividends in mean time.

Bond for Purchasing and Transferring Navy Five *per Cent.* Bank Annuities, after Six Months' Notice, being the Amount of Stock sold for the Obligor's Benefit; and for paying the Amount of the Dividends in the mean Time. - - - - 245

To invest amount of debt in stock, and pay dividends in mean time.

Bond to two Executors from two Persons who were Debtors by Bond to the Testator, for investing in the Names of the Executors, within a given Time, so much Stock Three *per Cent.* Consols, as the Amount of the Debt would purchase at the Date of the Bond; and to pay the Amount of the Dividends in the mean Time. -- - - - *Page* 263

To replace stock on request, and pay dividends in mean time.

Bond from Four to One, for replacing East India Stock on Request; and for paying the Amount of the Dividends in the mean Time. - - 269

For paying legacies, after obligor's death, under directions of will.

Bond from a Residuary Legatee to an Executor, for Payment of Legacies after the Obligor's Death, where a Testator gave several Legacies to be paid Six Months after the Death of the Residuary Legatee, with Interest from her Death; and directed her, within one Month from his Decease, to give a Bond to his Executor, for paying the Legacies accordingly; but if she neglected to give the Bond, he revoked the Bequest to her. - - - 273

From purchaser, for paying legacies charged on lands, and interest in mean time.

Bond from the Purchaser to the Vendor of an Estate charged with Legacies, payable to two Infants, when they respectively come of Age, where it had been agreed that Part of the Purchase Money, being the Amount of the Legacies, should remain in the Purchaser's hands,—for paying the Legacies as the Infants come of Age: and if both or either of them should die under Age, then to pay the Legacies or Legacy to the Vendor within Three Months: and for paying to the Vendor, Interest on the Legacies until they shall be respectively paid. - - 275

Bond from a Legatee to an Executor, on Payment of the whole Legacy, or a part of the Legacy, to refund, if there should be a Deficiency of Assets. *Page* 277 — Legatee to refund on deficiency of assets.

Bond from the President, and Two of the Governors of a Workhouse, to Executors, to refund a Legacy given to the Workhouse, in case of Deficiency of Assets. 280 — Governors of workhouse to refund, on deficiency of assets.

Bond for the Faithful Service of a Clerk, either to two Partners, or to them and their Executors or Administrators, and notwithstanding an Alteration in the Firm. - - - - - 281 — Faithful service of clerk.

Bond to secure the Fidelity of Bankers' Chief Clerk. 286 — Fidelity of bankers' chief clerk.

Bond for the Good Behaviour of a Servant in a Trade. 288 — Fidelity of servant in trade.

Bond that neither the Obligor nor his Wife, who are to be employed as Servants in carrying on an Art invented for copying any Picture or Print, will disclose the Secrets thereof. - - - - 289 — By servant, not to disclose an invention.

Bond from the Principal and Four Sureties, for the due Performance of the offices of Assistant Overseer of the Poor, Collector of Taxes, &c., for the Collectors, &c., of a Parish, and Depositary of the Parish Books and Papers. - - - - 295 — For fidelity as assistant overseer, collector of taxes, &c.

Bond from Three Trustees of an Assurance Society, to the Treasurer, for duly applying the Funds of the Society, according to the Directions of the Court of Directors; And to permit Suits or Actions to be brought in their Names, for Monies due to them, as Trustees for the Society, without becoming Nonsuit, &c. - 307 — From trustees of assurance society.

Bond from the Treasurer of an Assurance Society, to the Trustees, for duly applying the Monies of the Society which shall come to his Hands; and to permit Suits or Actions to be brought in his Name, for Monies due to him as Treasurer, without becoming Nonsuit, &c.; and to observe the Rules and Regulations of — From treasurer of assurance society.

the Society, which he ought to perform as Treasurer. - - - - *Page* 310

To grant a lease. Bond by a Tenant for Life, who had power to lease only for Twelve Years, but who had contracted to grant a lease for Twenty-one Years, that, at the end of Twelve Years, for which a Lease had been granted, the immediate Reversioner should, upon the Lessee's Request, grant another Lease for Nine Years, at the same Rent, and under the same Covenants, as were contained in the Lease for Twelve Years. - 312

On sale of infant's estate, to refund, pay interest, and liquidated damages, if infant should refuse to convey. Bond to the Purchaser of an Infant's Estate in Fee, that if the Infant, or his Heirs, should for Six Months after being capable, refuse to make a good Title, and execute a proper Conveyance, then Obligees will re-pay the Purchaser a Sum paid in part of the Purchase Money, with Interest, and a further Sum, by way of Liquidated Damages. - - - 314

To perform covenants. Bond for the Performance of Covenants contained in a Mortgage or Annuity-Deed. - - 316

To perform agreement. Bond for the Performance of an Agreement. - 318

With surety, to convey land sold. Bond from two Vendors, and their Surety, to a Purchaser, for the Performance of the Vendor's Covenants to convey the Premises sold. - - 318

With two sureties, to perform contract for building, &c. Bond from Two Builders, and their Two Sureties, for the due Performance of a Contract for Building a School, and Altering and Repairing a House. - 320

To procure assignment of term. Bond from a Vendor to a Purchaser, to procure an Assignment of an Outstanding Term. - 322

For conveyance by infant, or his heirs, &c., and for quiet enjoyment in mean time. Bond from Four Obligors to a Purchaser, that an Infant, and those claiming through him, or his Mother deceased, shall, within Six Months after he attains Twenty-one; or, in case of his Death previously, his Heirs, &c., or those claiming through him or his Mo-

ther, shall convey Freehold, and surrender Copyhold Lands; to an undivided Part of which the Infant is entitled, in common with the Obligors; and of which a Conveyance and Covenant to surrender to the Purchaser has been executed by the Obligors, the Infant, and others, by Indentures of even Date: and the Obligors and Infant have been paid their Shares of the Purchase Money: and that, in the mean time, the Purchaser, his Heirs, &c., shall quietly enjoy the Premises, without any Interruption from the Infant, his Heirs, &c., or those claiming through him or them, or through his Mother deceased. - *Page* 324

Bond on a Conveyance by Devisees in Trust for Sale, to a Purchaser, that the Devisor's Four Infant Sons, who are beneficially interested in the Purchase Money, shall severally, on attaining Twenty-one, convey to the Purchaser. - - - - 344 — That four infants shall convey on severally coming of age.

Bond from a Vendor to a Purchaser, that he will at his own Expence, within —— Months, procure the Heir, or Co-heirs of a Trustee, to convey the Legal Estate to the Purchaser: Or, if the Vendor should not be able to procure such Conveyance, then that he will repay the Purchase Money, at the end of such —— Months, on having the Premises re-conveyed; freed from all Incumbrances by the Purchaser, and from all manner of Waste, Spoil, and Damage: and that the Purchaser shall be permitted to receive the Rents, in lieu of Interest, till the Conveyance of the Legal Estate, or Repayment of the Purchase Money. 346 — To procure trustees' heir to convey legal estate, or to repay purchase money.

Bond from a Vendor to a Purchaser, for quiet Enjoyment of Freehold and Leasehold Property, or a Return of the Purchase Money in case of Eviction. - 350 — For quiet enjoyment; or return of purchase money, if evicted.

Bond for quiet Enjoyment, where the Title commenced at too late a Period. - - - 352 — For quiet enjoyment, where title was too recent.

Bond from a Vendor to a Purchaser, for peaceable Enjoy- — For quiet enjoyment against all

persons, except lessee for years. ment of an Estate, against all Persons whomsoever; excepting Persons claiming under a Lease for Years. *Page* 354

For quiet enjoyment generally, further assurance, &c. Bond from a Vendor to a Purchaser, for quiet Enjoyment against all Mankind; free from all Incumbrances; and for further Assurance generally. - 355

To repair a road. Bond from a Purchaser under the Commercial Road Act, to the Trustees, to keep in Repair a Road from the Land purchased to communicate with the new Road. 358

To resign rectory in favour of one of patroness's two sons, when he is competent. Bond to resign a Rectory upon Request, after either of the Patroness's two Sons is competent to take it, and in the mean time to reside. - - 360

To resign vicarage when son of lessee is competent. Bond to a Patron possessed of a Vicarage for Years, to resign the Living upon Request, when his Son shall be competent to take it, and in the mean time not to be absent from the Living for more than Two Months in a Year. - - - - 376

Resignation of a benefice, before a bishop. A Form of Resignation taken before a Bishop. 377

Resignation of a benefice, before a notary public. Resignation of a Vicarage or Rectory (*mutatis mutandis*) be-before a Notary Public, when the Bishop is absent. 378

To resign when patron's protege shall be fit. Bond to resign a Rectory when the Patron's Protege shall be fit to be presented. - - - 379

To secure incumbency to incumbent for his life. Bond from the Purchaser of an Advowson to secure the Incumbency to the Vendor, the present Incumbent, for his Life. - - - - - 380

Legatee of leaseholds to executor. [Bond from the Legatee of Leaseholds to an Executor, conditioned to indemnify the Testator's Estate against the Rent and Covenants, and also against any Loss by reason of Deficiency of Assets, or otherwise. 382

From principal to surety in a bond. [Counter-Bond by a Principal to a Surety. - 386

[Bond by a Vendor to a Purchaser, conditioned to substantiate a Title to the redeemed Land-tax, within Six calendar Months. - - *Page* 387] — By vendor to redeem land-tax.

Bond not to carry on Business within Half a Mile for a certain Number of Years, nor to solicit Custom of Persons mentioned in a Schedule, under the Pain of paying Liquidated Damages. - - - 439 — Not to carry on business.

Bond from Two Principals and their Two Sureties to Four Bankers, for securing Sums advanced and to be advanced for the Principals, by the Firm of the Banking-House for the time being, with Interest and Commission: and with a Proviso, limiting the Amount of the Money to be recoverable under the Bond. - 446 — By principals and sureties to bankers, for limited amount.

Bond from a Tradesman and his Two Sureties to Bankers, to secure to the Firm of the Banking-House for the time being, such Balance as may become due on Account Current with the Principal, or with him and any Partner or Partners: with a Proviso, limiting the Amount of the Money to be recovered under the Bond; but the Bond to be a continuing Security to that Amount. - - - - 460 — To bankers for limited current balance.

A Single Bond or Bill, where the total Amount of the Money secured, or to be ultimately recoverable thereupon, is uncertain, and without any Limit. 467 — Single bond for unlimited sum.

See further as to Bond, titles, Annuity, Arbitration, Indemnity, Mortgage, and Settlement; and Index to the Precedents, title Bond. — Particular bonds.

CHARITABLE USES.

For Charitable Uses, see title Trust.

CLERKSHIP & APPRENTICESHIP.

For Clerkship & Apprenticeship, see title Solicitor.

COGNOVIT ACTIONEM.

For Cognovit Actionem, see title Warrant of Attorney.

CONFIRMATION. 471

Unattested will to devisee in fee. — Release by way of Confirmation by an Heir-at-Law of an Estate mentioned to be devised by a Will unattested, and where the Words of the intended Devise extended only to the Life of the Devisee; the Heir claiming a conditional Benefit under the Will, and thinking that it was the Testator's Intention to give the Fee. 473

Unattested will to trustee for a term, to pay debts; remainder in tail, &c. — Confirmation by an Heir-at-Law of a Will executed in the Presence of Two Witnesses only, by a Release in Fee, to the use of a Trustee for 500 Years; Remainder to the use of a Son, a Devisee in Tail: Remainder to the use of a Daughter, a Devisee in Fee; Declaration that the Premises shall be subject to the Payment of such of the Testator's Debts, &c., as they would have been liable to, in case his Will had been duly executed: and that the Term of 500 Years was limited to the Trustee to raise Money for Payment of Debts, &c., and, subject thereto, to attend the Uses limited. 476

Release in fee, and for lives; and covenant to surrender copyholds. — Confirmation of a Will by an Heir-at-Law, to prevent the necessity of proving it in Chancery; being a Release in Fee, and of Leasehold for Lives; with a Covenant to Surrender Copyholds to the Trustees of the Will, to be held to and for the Uses, and upon the Trusts, declared by the Will, and to be subject to the Sums of Money thereby charged on the Lands. - 479

In fee to devisee. — Confirmation of a Devise by the Testator's Heir-at-Law. 485

Confirmation, release in fee, and assignment on trusts for sale. — Confirmation by the Heir-at-Law of a Devisee in Fee: Release in Fee by the Heir-at-Law and the other Children of the Testator, all beneficially interested

under the Will; and Assignment by all of them of Leaseholds, upon trust to sell the Lands when the Youngest Child comes of Age, at which Time she is to execute the Deed: with a partial Power of Pre-emption to the Heir-at-Law, and Admission by the other Children that some Lands interlined in the Will did not pass thereby; but descended to the Heir-at-Law. *Page* 492

Attestation of the Execution by the Infant after she became of Age. - - - - - 529

Attestation of execution by a person who afterwards became of age.

Confirmation of a Devise of a Copyhold to a Younger Son, where the Testatrix being Equitable Tenant in Tail, with the Equitable Remainder in Fee, only the Equitable Remainder in Fee passed by her Will, but the Heir being desirous to establish the Devise intended to have been made,—For that purpose, the Heir and the Devisee, on the Day of the Date of this Indenture, have surrendered to the Use of Trustees in Fee the devised Premises; with a Memorandum, that the Surrender was made to the Trustees, upon such Trusts, &c., as the Devisee should by his Will appoint; and in default of Appointment, in trust for the Devisee in Fee. Testatum, Covenant by the Heir for further Assurance; and for Peaceable Enjoyment: and Covenant by the Devisee with the Heir, for Peaceable Enjoyment of Copyholds devised to him. - 530

By heir, of devise by equitable tenant in tail of copyholds.

Confirmation by the Testator's next of Kin of Payments made to the Legatees under his Will, whereby he gave his Residuary Personal Estate to such of his Nephews and Nieces as should be living when the Youngest came of Age; And Consent to the Payment of the Residue when the Youngest Child shall come of Age. - - - - - 539

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Confirmation of the Title of a Purchaser of a Copyhold Estate, where the Title was derived under a Surrender by a Married Woman alone, without her Husband, to the Use of herself for Life; Remainder to her

By heir of copyholds surrendered by a woman without her husband.

Husband in Fee, with an intended Shifting Use in Fee, which failed of Effect; the Confirmation being by a Release by the Heir of the Wife to the Purchaser in Fee, according to the Custom of the Manor. 542

By one of three trustees, where two only had been parties to a lease. Confirmation of a Lease by One of Three Trustees, where a Testator gave Leasehold Lands to Three Trustees, upon Trust to underlease so much as he should not have leased, Two only of whom having been Parties to a Lease, and doubts having arisen whether Two of the Trustees were alone competent to make the Lease; therefore the other consented to confirm; and which is accordingly done by Indorsement on the Lease. - - - - - 545

Of lease by lessor, who subsequently acquired legal estate. Confirmation of a Lease by the Lessor, who had not the Legal Estate when he executed the Lease, but who subsequently acquired it. - - - 548

Covenant to levy fine, where land had been described in wrong parish. Confirmation by way of Covenant by Three Vendors severally, to levy a Fine *Sur conuzance de droit*, at the Purchaser's Expense, to Uses to prevent Dower, of a Close described in the Lease and Release to be in a wrong Parish: Covenant by the Three Vendors severally, separate from the others, and only as to the Acts of himself, his heirs, &c., that the Covenantors respectively, and their respective Heirs, &c., will perform the Covenants in the Release, concerning the Close therein described, in the same manner as if the same Covenants had been concerning the Close herein comprised; so that the said Covenants may have the same Effect, as to the Close herein comprised, as if the same Close had been the Close described in the Release. - - - - - 550

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Covenant to pay [Covenant by One with One for the Payment of a Sum of

Money Lent, and Interest. (Variation where the Covenant is to secure a Debt already due; also where it is the Joint and Several Covenant of more than One. - - - - *Page* 561 — money borrowed, and interest.

[Covenant by the Customer of a Banking-house, to secure the Balance for the Time being on an Account Current. (Variation where a Third Person joins in the Covenant as Surety).] - - - 563 — Covenant to secure account current to bankers.

PRECEDENTS

IN

CONVEYANCING.

AWARD.

BY ONE ARBITRATOR, ON GENERAL REFERENCE OF PAYMENT, AND RELEASES.

AWARD (*a*) *of one Arbitrator, under cross Bonds of Submission on a general Reference, That a* SUM OF MONEY *shall be paid by one of the Parties to the other; and that each of the Parties shall give to the other a* GENERAL RELEASE.

Recital of differences be-

TO ALL TO WHOM THESE PRESENTS SHALL COME. I [*arbitrator*], of &c., *send greeting*. WHEREAS divers

Equity will in some cases decree the specific performance of an award.

(*a*) Where the payment of money alone is awarded, the proper mode of enforcing performance is an application to a Court of law; *Hall* v. *Hardy*, 3 P. Wms. 190; except the award were made pursuant to a reference by order of a Court of equity; in which case, that Court would undoubtedly decree performance, though the award were only to pay money. Caldw. Arb. 167. But wherever any thing is directed by the arbitrators to be done *in specie*, as to convey an estate, or the like, there, a bill in equity for a specific performance will lie, if the plaintiff has paid, and the defendant accepted part of the money awarded as the consideration for the conveyance; *Hall* v. *Hardy*, 3 P. Wms. 189; or if either party has performed his part of the award; *Bishop* v. *Bishop*, 2 Ch. Rep. 142; *Bishop* v. *Webster*, 1 Eq. Cas. Abr. 51, pl, 9; or if there has been any subsequent agreement by the parties to have the award executed; *Thompson* v. *Noel*, 1 Atk. 62; even although the award was not made originally by the direction of the Court. *Bishop* v. *Bishop*, 1 Ch. Rep. 142. *Vide Wood* v. *Griffith*, 1 Wils. Ch. Rep. 34; 1 Swans. 52, *S. C.* *Et vide post*, p. 63, n. (*c*); 5, n. (*a*). [And though an action at law cannot be maintained on the order of a Court of equity to refer *per se;* yet if the parties have bound themselves by consent to submit to such reference, the action, it seems, may be maintained on the promise to perform the award, such promise being supported by a consideration; and an agreement on the other

BY ONE ARBITRATOR, ON GENERAL REFERENCE, OF PAYMENT, AND RELEASES.

differences and disputes having arisen, and been depending between [A. B.], of &c., and [C. D.], of &c., they the said [A. B.] and [C. D.] in order to put a final end to the said differences and disputes, did agree to refer the same to the award, order, and determination of me the said [*arbitrator*]; and did accordingly by their several obligations, bearing date on or about the —— day of —— instant (*or* last), respectively become bound each to the other, in the penal sum of —— pounds, of good and lawful money of Great Britain; *With conditions* thereunder written, to stand to, obey, abide, observe, perform, fulfil, and keep the award, order, arbitrament, final end, and determination of me the said [*arbitrator*], an arbitrator indifferently elected and named, as well on the part and behalf of the said [A. B.], as of the said [C. D.], to arbitrate, award, order, judge, and determine of and concerning all and all manner of action and actions, cause and causes of action, suits, bills, bonds, specialties, covenants, contracts, promises, accounts, reckonings, sums of money, judgments, executions, extents, quarrels, controversies, trespasses, damages, and demands whatsoever, both at law and in equity, at any time theretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed, or depending by or between the said parties, or either of them; *So as* the said award of me the said arbitrator, should be made in writing, and ready to be delivered (*b*)

tween two parties, and submission to the award of one arbitrator, by cross bonds;

with conditions for a general reference.

so as the award should be made on or before a given time.

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side to perform it amounts to such a consideration. *See Biddell* v. *Dowse*, 6 Barn. & Cress. 253.]

When the award is made, the law implies it is then ready to be delivered.

(*b*) An award, which is required to be made in writing, &c. and *ready to be delivered* at such a time, is complete, if made in writing, and *ready to be delivered* by the arbitrator within the time, though not actually delivered. *Brown* v. *Vawser*, 4 East, 584. So where, by the terms of reference, attestation and delivery are not necessary to perfect an award, if it be once complete by the signature of an umpire or arbitrator, it is then ready for delivery, though not attested or delivered. *Henfree* v. *Bromley*, 6 East, 310. For the law implies that it is then ready to be delivered; and therefore, on the issue *nul tiel agard*, it is not necessary for the plaintiff to aver in his replication that the award was ready to be delivered, but only to state that the arbitrators *made* their award on or before the time limited, and to set forth the award. *Joyce* v. *Haines*, Hard. 399; 3 Vin. Abr. 117, pl. 22; *Vide ante*, Vol. 2, p. 583, n. (*b*). However it is now usual in the replication also to state, in the words of the

BY ONE ARBITRATOR, ON GENERAL REFERENCE, OF PAYMENT, AND RELEASES.

to the said parties in difference, or such of them as should require the same, on or before the —— day of —— then next; as by the said obligations and conditions more fully appear. NOW KNOW YE that I the said [*arbitrator*], the arbitrator aforesaid, having taken upon me the charge of the said award and arbitrament; and having been attended by the said parties and their respective attornies; and having heard, examined, and considered the allegations and evidence of both the said parties and their witnesses (*c*), concerning the premises, *do* thereupon make this my award in writing concerning the same, in manner and form following, that is to say; I do award, arbitrate, and determine that the said [C. D.], his executors or administrators, shall and do well and truly pay, or cause to be paid to the said [A. B.], his executors or administrators, on the —— day of —— next ensuing, between the hours of —— and —— of the clock of the same day, at the house of —— in —— in the said county of ——, the sum of —— pounds of lawful money of Great Britain. AND I do further award, arbitrate, and determine, that upon payment of the said sum of —— pounds to the said [A. B.], as aforesaid,

Testatum.

award that one party shall pay to the other a sum of money;

and that each of the parties shall give to the other a general release.

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submission, that the award was "ready to be delivered to the said parties in difference, or such of them as should require the same." *Vide* Caldwell on Arbitration, 336; 2 Chitty on Pleading, 645, 3d ed.

(*c*) All the witnesses of the party against whom an award is made, should regularly be examined, and in the presence of him and of his attorney, if he require it, or it will be a ground for setting aside the award; *Walker* v. *Frobisher*, 6 Ves. 70†; but the fact must be clearly proved by affidavits: however, a formal requisition that a witness shall be examined, is not requisite; merely naming and producing him to the arbitrator is sufficient. *Beddington* v. *Southall*, 4 Price, 235, 236. And if, upon a reference by rule of Court, either party is precluded by the terms of the rule from going into evidence of that which he is desirous to try, his remedy is by moving to set aside the rule of reference, upon affidavits, shewing that it was drawn up by mistake: but he cannot impeach the award. *Doe*, lessee of Lord *Carlisle*, v. *Bailiff*, &c. of *Morpeth*, 3 Taunt. 378; *Prosser* v. *Corringe*, 3 Taunt. 432.

The witnesses should be examined in the presence of the party, if he require it.

[† But in *Hewlett* v. *Laycock*, 2 Carr. & P. 576, Lord C. J. *Abbott* was of opinion that the exclusion of *both* the parties and their attornies during the examination of a witness; and the taking such examination at the witness's own house was no ground for setting aside an award.]

As to exclusion of *both* parties.

BY ONE ARBITRATOR, ON GENERAL REFERENCE, OF PAYMENT, AND RELEASES.

they the said [A. B.] and [C. D.] shall and do respectively, at the costs and charges of the party requiring the same, sign, seal, and as their respective acts and deeds deliver, each unto the other of them, mutual general releases in writing of all and all manner of action and actions, cause and causes of action, bills, bonds, covenants, debts, rent, specialties, controversies, claims, and demands whatsoever, from the beginning of the world until the day of the date of the aforesaid obligations. IN WITNESS whereof I the said [*arbitrator*], the arbitrator aforesaid, have hereunto set my hand, the —— day of ——, 18—.

SIGNED AND PUBLISHED (being first duly stamped (*d*), in the presence of us (*e*).

Stamp.

(*d*) By the 55 Geo. 3, c. 184, the stamp duty on an AWARD is *one pound fifteen shillings:* and where the same, together with any schedule or other matter put or indorsed thereon, or annexed thereto, shall contain 2,160 words or upwards; then for every entire quantity of 1,080 words contained therein, over and above the first 1,080 words, a further *progressive* duty of *one pound five shillings*.

The same stamp is requisite, whether the award be under hand, or under hand and seal, and whether it be or be not delivered as a deed.

It was not formerly necessary that an award in writing, though under seal, should have a deed stamp, unless it was delivered *as a deed;* for if it was only delivered *as an award*, it was sufficient if it had the award stamp of ten shillings. *Brown* v. *Vawser*, 4 East, 584; Tidd's Prac. 860, 7th ed.; *Wilson* v. *Smee*, Addendum, Kyd on Awards, VII. 2d ed.; *Blundell* v. *Brettargh*, 17 Ves. 241; *Et vide ante*, Vol. 2, p. 588, n. (*d*). But this distinction is rendered immaterial by the above act, as it requires the same stamps for awards, as for deeds not affected by the *ad valorem* duty, and therefore the same stamp is requisite, whether the award be under hand only, or under hand and seal; and whether it be or be not delivered as a deed.

Where there is a community of interest, one stamp is sufficient.

Where several under-writers on a policy enter into an agreement to refer the demand of the assured to arbitration, one stamp for the agreement to refer, and one stamp for the award, are sufficient, there being a com-

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It seems prudent to have two witnesses to an award.

(*e*) It seems generally prudent to have two witnesses to an award or umpirage, in order to prevent the trouble which would be caused in case a single witness should die, and it should afterwards be requisite to have an affidavit of the due execution, in order to ground a motion for an attachment.

munity of interest between the parties in the subject matter. *Goodson* v. *Forbes*, 6 Taunt. 171; 1 Marsh. 525, *S. C.* [Upon the same principle, where the members of a mutual insurance club all executed the same power of attorney, severally authorizing certain persons to sign the club policies for them, it was held, that it required only one stamp. *Allen* v. *Morrison*, 8 B. & C. 565.]

If an award be made on an improper stamp, and no application be made to enforce the award, the Court will not set it aside; because the award may be rendered a valid instrument, by procuring the proper stamp and paying the penalty, before the plaintiff moves for an attachment for non-performance of the award, or takes any other step to enforce it. *Preston* v. *Eastwood*, 7 Durnf. & East, 95. And if an objection to the stamp be not alleged as a ground for obtaining a rule to shew cause to set aside an award, the Court will not suffer it to be relied on afterwards, when cause is shewn. *Liddell* v. *Johnstone*, II. 38 Geo. 3, K. B. 2 Tidd's Prac. 874, 7th ed.

An objection for want of a proper stamp cannot be supported, if no application be made to enforce the award; and if it be not alleged as a ground for obtaining a rule, it cannot be made when cause is shewn.

AWARD (*a*) *of two Arbitrators under Cross Bonds from A. B., to C. D. and E. F., and from C. D. and E. F. to A. B., on a* GENERAL REFERENCE, *where the Submission had been*

BY TWO ARBITRATORS, OF DIFFERENT SUMS, VACATION AND CONFIRMATION OF CONTRACTS.

(*a*) The mode of enforcing an award by the party in whose favour it is made, is by *action*: or when the submission is made a rule of Court, by *attachment*; *Forster* v. *Brunetti*, 1 Salk. 83; and if a *verdict* has been taken for the plaintiff's security, by entering up *judgment* thereon, and taking out *execution*. 2 Tidd's Prac. 865, 7th ed. *Vide ante*, p. 1, n. (*a*). [Where a reference has been made under an order in Chancery, the Court will enforce the performance of the award, though it be not made a rule of Court, and it be part of the order that the parties should execute arbitration bonds. Marquis of *Ormonde* v. *Kynnersley*, 2 Sim. & Stu. 15]

The mode of enforcing an award.

Upon an affidavit that the original award was lost, by the mail being robbed in coming to town, the Court granted a rule for an attachment *nisi* on a copy of it. *Robinson* v. *Davis*, 1 Stra. 526. So, if an award be lost, the Court will, nevertheless, permit judgment to be entered accordingly, upon an affidavit of its contents. *Hill* v. *Townsend*, 3 Taunt. 45. In which case the original draft of the award was annexed to the affidavit.

If the award is lost, there must be an affidavit of its contents.

[In an action to enforce the performance of an award, if the plaintiff de-

As to declaring on the award.

BY TWO ARBITRATORS, OF DIFFERENT SUMS, VACATION AND CONFIRMATION OF CONTRACTS.

made a Rule of Court, and the TIME *for making the Award had been* ENLARGED BY *several Orders of* THE COURT, *That C. D. owes A. B.* 3,516*l.* 8*s.* 1*d.; of which E. F. is liable for* 226*l.* 12*s.* 6*d.; E. F. to pay the* 226*l.* 12*s.* 6*d. to A. B. on the* 10*th of June next, at Peel's Coffee House: and* 3,289*l.* 15*s.* 7*d., the Residue, to be paid by C. D. by Instalments; and for securing the Payment thereof, C. D. within one Week to execute a Warrant of Attorney to confess Judgment to A. B. for the* 3,289*l.* 15*s.* 7*d., with Stay of Execution by a Defeazance, until the Instalments shall become payable: in case C. D. should neglect to execute Warrant of Attorney, that A. B. may proceed for Recovery of the whole* 3,289*l.* 15*s.* 7*d.: that a Contract for a Mare and Colt be rescinded; that the Mare and Colt are the Property of A. B.; that a Bond given on account of the Purchase of the Mare and Colt be cancelled, or, if lost, a Release given: that an Annuity granted by C. D. to A. B. shall stand confirmed: that on Payment of the* 226*l.* 12*s.* 6*d. A. B. shall give E. F. a general Release: and that the Costs of the Reference and Award shall be borne by A. B. and C. D. equally.*

Exordium.

TO ALL TO WHOM THESE PRESENTS SHALL COME, *We* [*W. Adam*], of Lincoln's Inn, in the county of Middlesex, esquire, and [*I. 'Espinasse*], of Gray's Inn, in the said county, esquire, *send greeting.* WHEREAS, by two several bonds or obligations, bearing date respectively the (fourteenth) day of (March) last; *one* of them under the hand and seal of [A. B.], of &c., esquire; *and* the other

Recital of cross bonds from one to two, and from two to one;

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clares upon the award, it is necessary to prove the execution of the arbitration bond, as well by the plaintiff as the defendant; as the submission by all the parties interested must be shewn; *Dilley* v. *Polhill*, 2 Stra. 923; *Antram* v. *Chase*, 15 East, 209; *Biddel* v. *Dowse*, 6 B. & C. 255; *Ferrer* v. *Oven*, 7 B. & C. 427; for which reason, it is better to declare on the bond. See 7 B. & C. 430.]

BY TWO ARBITRATORS, OF DIFFERENT SUMS, VACATION AND CONFIRMATION OF CONTRACTS.

of them under the hands and seals of the Right Honourable [C. D.], Earl of [K.], in the kingdom of Ireland, and [E. F.], of &c., esquire; *Whereby* the said [A. B.], in one of such bonds or obligations, became bound to the said [C. D.], Earl of [K.], and the said [E. F.]; *And* in the other of such bonds or obligations, the said [C. D.] Earl of [K.], and the said [E. F.] became bound to the said [A. B.] in the penal sum of (10,000*l.*); *With conditions* thereunder respectively written, for making void the same in case the said obligors respectively, their heirs, executors, and administrators, should in all things well and truly stand to, obey, perform, fulfil, and keep the award, order, arbitrament, final end and determination of us the said [*W. Adam*] and *[*I.'Espinasse*], arbitrators indifferently named, elected, and chosen, as well on the part and behalf of the said [A. B.], as of the said [C. D.], Earl of [K.], and [E. F], to arbitrate, award, order, judge, and determine of and concerning all and all manner of action and actions, cause and causes of action, suits, bills, bonds, specialties, judgments, executions, quarrels, controversies, trespasses, damages, and demands whatsoever, at any time or times heretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed, or depending by or between the said parties, and each of them; *So as* we the said arbitrators did make and publish our award in writing, on or before the (fourteenth) day of (April) now last past: And the said parties did thereby also consent and agree, that the submission thereby made to the award, or to the umpirage therein mentioned, should be made a rule of his Majesty's Court of King's Bench at Westminster, which was afterwards accordingly done. And whereas, by a certain memorandum in writing, under the hand of the said [A. B.], indorsed or written in the margin of one or both of the said bonds or obligations, at the time of the execution thereof, *it was agreed* between the parties, that the said [E. F.] should not be accountable for the payment of any sum of money, which should happen to be awarded against the said [C. D.], Earl of [K.], or against the said [E. F.], beyond or further than the sum of (230*l.*), being the supposed amount of two bills of exchange, accepted by the said Earl, and which were then in the hands of (*J.* and *H. J.*

with conditions for a general reference to two arbitrators;

[*7]

so as the award should be made on or before a given day.

Recital of agreement, that award or umpirage should be made a rule of court; which was afterwards done.

Recital of indorsement that one of the two obligors should not be accountable beyond a certain sum.

BY TWO ARBITRATORS, OF DIFFERENT SUMS, VACATION AND CONFIRMATION OF CONTRACTS.

of *Pall-Mall* ——), and for which the said [E. F.] thereby agreed to be answerable. And whereas, by several rules or orders of the said Court of King's Bench, the time for us the said arbitrators, for making our award, hath been enlarged (*b*) till the (ninth) day of (May) instant, the day of the date hereof; as by the said bonds and rules of court, reference being thereunto respectively had, will more fully and at large appear. Now these presents witness, that we, the said [*W. Adam*] and [*I. 'Espinasse*], the arbitrators named and appointed in and by the said bonds respectively, having taken upon ourselves the burthen of *the said arbitration, and having fully heard, and maturely considered all the evidence produced on behalf of each of the said parties in difference, and having carefully investigated and examined all the accounts and vouchers produced before us touching the matters in difference, and to us referred, in manner aforesaid, *Do* hereby make and publish this our award in writing, in manner following; that is to say: *First*, we do find and award, that there is justly due and owing from the said [C. D.], Earl of [K.], to the said [A. B.] the sum of (3,516*l.* 8*s.* 1*d.*); of which said sum, we find that the said [E. F.] has become, or made himself liable for the payment of (226*l.* 12*s.* 6*d.*), part of the said sum of (3,516*l.* 8*s.* 1*d.*), which we find to be a just and fair debt: *We therefore* order and award the said [E. F.] to pay the said sum of (226*l.* 12*s.* 6*d.*) to the said [A. B.], or to his attorney lawfully authorized to receive the same, on the (tenth) day of (June), next ensuing the date of this our award, at Peel's Coffee-house, Fleet Street, in the city of London, between the hours of ten and twelve of the clock in the forenoon of that day: *And* as to the sum of (3,289*l.* 15*s.* 7*d.*), being the residue and remainder of the said sum of (3,516*l.* 8*s.* 1*d.*), (after deducting the said sum of (226*l.* 12*s.* 6*d.*), so awarded to be paid by the said [E. F.], as aforesaid,) *We* order and award the same to be paid by the said [C. D.], Earl of [K.], to the said [A. B.], or to whom he shall duly authorize to receive the same, at the time and in manner following: that

Recital that by several rules of Court, the time for making the award had been enlarged.

Testatum.

[*8]

Award,

that C. D. owes A. B. 3,516*l.* 8*s.* 1*d.*;

of which E. F. is liable for 226*l.* 12*s.* 6*d.*

E. F. to pay the 226*l.* 12*s.* 6*d.* to A. B. on 10th June next, at Peel's Coffee-house:

and 3,289*l.* 15*s.* 7*d.* the residue, to be paid by C. D. by instalments:

(*b*) *Vide ante*, Vol. 2, p. 631, n. (*a*), *ad finem*.

BY TWO ARBITRATORS, OF DIFFERENT SUMS, VACATION AND CONFIRMATION OF CONTRACTS.

is to say; (*specify the times and proportions*). AND for the better securing the payment of the said sum of (3,289*l.* 15*s.* 7*d.*), so by us awarded to be due from the said [C. D.], Earl of [K.], and to be paid by him, at the time and times, and in manner aforesaid, to him the said [A. B.], *We* do hereby award, order, and direct, that within one week from the day of the date of this our award, or so soon after as the same shall be demanded, the said Earl of [K.] shall (*c*) duly seal and execute unto him the said [A. B.] a warrant of attorney, to confess a judgment against him the said Earl of [K.], in his Majesty's Court of King's Bench at Westminster, as of this present Easter Term, for the said sum of (3,289*l.* 15*s.* 7*d.*), so by us awarded as aforesaid, to be paid by the said Earl of [K.] to the said [A. B.]; *but with stay of execution, as to all the respective sums of (1,050*l.*, 1,050*l.*, and 1,189*l.* 15*s.* 7*d.*), (by a defeazance, to be indorsed on such warrant of attorney,) until the same shall have become payable respectively, at the several time and times hereinbefore limited and appointed for the payment thereof in and by this our award, according to the true meaning hereof. AND in case the said C. D. Earl of [K.] should refuse or neglect to execute the said warrant of attorney as aforesaid, *We* then order and award that it shall and may be lawful to and for the said [A.B.], after such refusal, to become entitled to, and to demand the whole of the said sum of (3,289*l.* 15*s.* 7*d.*) from the said Earl of [K.], and to proceed by attachment, or otherwise, for the recovery thereof; and be entitled to recover the same (after such refusal as aforesaid) in such manner as if we had in the first instance ordered the same to be paid all at once, and not by instalments, as before mentioned, according to the true meaning hereof. AND we do hereby further award and declare, that the contract for a certain mare and colt, now in Ireland, supposed to have been sold by the said [A.B.] to the said Earl of [K.], be rescinded: and that such mare and colt are now the property of the said [A. B.], and not of the said Earl of [K.]. AND we do order and direct, that a certain bond or obligation for the sum of (630*l.*), given by the said Earl

and for securing the payment thereof,

C, D. within one week, to execute a warrant of attorney to confess judgment to A. B. for the 3,289*l.* 15*s.* 7*d.*,

[*9]

with stay of execution by a defeazance, until the instalments shall become payable:

in case C. D. should neglect to execute warrant of attorney, that A. B. may proceed for recovery of the whole 3,289*l.* 15*s.* 7*d.*:

that a contract for a mare and colt be rescinded;

that the mare and colt are the property of A. B.;

that a bond given on account of the purchase of the

[(*c*) *Quære?* "at his own costs and charges"]

BY TWO ARBITRATORS, OF DIFFERENT SUMS, VACATION AND CONFIRMATION OF CONTRACTS.

mare and colt be cancelled: or, if lost, a release given:

that an annuity granted by C. D. to A. B. shall stand confirmed;

that on payment of the 226*l.* 12*s.* 6*d.* A. B. shall give E. F. a release:

[*10]

and that the costs of reference and award shall be borne by A. B. and C. D. equally.

of [K.] to the said [A. B.], on account of the said mare and colt, be delivered up by the said [A. B.] to the said Earl of [K.], to be cancelled; or a proper release be given for the same, in case such bond or obligation should appear to have been lost or mislaid. And we do further hereby award and declare, that a certain annuity, granted by the said Earl of [K.] to the said [A. B.], for securing to him the said [A. B.] the sum of (100*l.*) *per annum*, during the life of the said Earl of [K.], shall stand established, and be confirmed; and the said [A. B.] be entitled regularly to receive the same, according to the tenor thereof, from the said Earl of [K.]. And we do further award and direct, that on payment of the before-mentioned sum of (226*l.* 12*s.* 6*d.*) on the (tenth) day of (June) next, by the said [E. F.] to the said [A. B.], the said [A. B.] shall give to the said [E. F.] a proper release and discharge for the same. And we do hereby further order, award, and direct, that the *costs and charges of this reference, and the charges of making this our award (*c*), shall be paid and borne by

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(*c*) *Quære.* Whether an award upon the reference of an action, directing the payment of costs of the award, without fixing the amount thereof, is bad in that point for uncertainty; or whether the amount may not be taxed by the officer of the Court? *Barrett* v. *Parry*, 4 Taunt. 658. And see *Fitzgerald* v. *Graves*, 5 Taunt. 342.

Power of arbitrators as to costs.

When a cause is depending, the submission is either silent with respect to *costs*, or they are directed to abide the event of the award, or else to be in the discretion of the arbitrator. The power of awarding costs is necessarily consequent to the authority conferred upon the arbitrator of determining the cause; and the reason why, in references by rule of Court, a provision is frequently inserted, that the costs shall abide the event of the award, is that the arbitrator may not have it in his power to with-hold costs from the party who is in the right; but that is to be considered as the restriction of a power, which he would otherwise necessarily have, of allowing costs at his election. *Roe* ex dem. *Wood* v. *Doe*, 2 Durnf. & East, 644. *Hartnell* v. *Hill*, Forrest. 77. In *Whitehead* v. *Firth*, 12 East, 165, the Court of King's Bench held, that upon a submission by bond of all matters in difference between the parties in a cause, the arbitrator has no authority to award costs as between attorney and client, but only as between party and party. But in *Hartnell* v. *Hill*, Forrest, 73, the Court of Exchequer held, that where the submission to an award

the said [A. B.] and the said Earl of [K.], in equal moieties. In witness whereof, we the said arbitrators have hereunto set our hands and seals, the (ninth) day of (May), 18—.

BY TWO ARBITRATORS, OF DIFFERENT SUMS, VACATION AND CONFIRMATION OF CONTRACTS.

Testimonium.

Witnesses,

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is by bond merely, the arbitrators may award costs between attorney and client; and though the arbitrators award the costs of the reference, which are not within the terms of the submission, that will not vitiate the award itself, but it will be good as to the remainder. *Post*, p. 14. For, when there is no cause depending, the arbitrators cannot award the costs of *reference*, unless power be expressly given to them for that purpose: [because such costs arise subsequent to the submission; and therefore cannot, without express words, be included in it.] *Candler*, or *Chandler*, v. *Fuller*, Willes, 62. Kyd on Awards, 394, 2d ed. *S. C.* So, where all matters in difference are referred to arbitration, except the costs of the *action*, and no notice is taken of the costs of *reference*, the latter are not in the discretion of the arbitrator. *Strutt* v. *Rogers*, 2 Marsh. 524. 7 Taunt. 213, *S. C.* Nor will an award, that one party shall pay to the other the costs by him sustained in the action, include the costs of reference. *Browne* v. *Marsden*, 1 H. Bla. 223. If no directions be given respecting the costs of an award, they are to be paid by both parties equally. *Grove* v. *Cox*, 1 Taunt. 165. [Where by the order of reference costs were to abide the event of the cause; and there were two defendants, one of whom did not attend before the arbitrators, or take any part in the proceedings of the reference, and the Master taxed the whole costs of the cause, and of the reference, in an entire sum, to the other defendant, the Court refused to grant an attachment for the non-payment of these costs, which should have been taxed to the defendants, jointly, in whose favour the award was made. *Dickins* v. *Jarvis*, 5 Barn. & Cress, 528.]

Qu. whether an arbitrator can, without authority, charge for his own expenses.

An arbitrator cannot, it seems, without authority, charge a certain sum for his own expenses. *George* v. *Lousley*, 8 East, 13. For it has been held, that the law raises no *implied* promise to pay an arbitrator for his trouble. *Virany* v. *Warne*, 4 Esp. N. P. C. 47. But see *Swinford* v. *Burn*, 1 Gow, 7, 8, and the cases there cited, by which it seems that an arbitrator may recover a compensation for his trouble. If arbitrators award an excessive sum to be paid to themselves, the Court of Common Pleas will refer it to the prothonotary to reduce it. *Miller* v. *Robe*, 3 Taunt. 461. *Fitzgerald* v. *Graves*, 5 Taunt. 342. See further as to costs, 2 Tidd's Prac. 862, 7th ed. Caldwell on Arbitration, 70, 469.

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AWARD (*a*) *by one Arbitrator, under cross Bonds of Submission, after a Verdict in ejectment for the Plaintiff, respecting his Demand of mesne Profits, and the Value of a Wind-Mill removed after the Verdict and before the Possession was delivered by the Sheriff, where the Arbitrator had, in pursuance of the Submission, enlarged the Time for making his Award, and where no Witnesses were examined, that the Defendant shall pay to the Lessor of the Plaintiff,* 100*l. in full discharge of the Matters referred..*

TO ALL TO WHOM THESE PRESENTS SHALL COME. I, [*arbitrator*], of Lincoln's Inn, in the county of Middle-

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An award should be certain and final.

(*a*) The general requisites of an award are, that it be certain and final. 1 Roll. Abr. 263. 1 Bac. Abr. Gwill. ed. 218. *Arbitrament*, (E), 2. For as an award is in the nature of a judgment, it ought to be wholly decisive; for if it does not determine the matter, it becomes the cause of a new controversy: therefore, if the arbitrators award a bond for quiet enjoyment of lands, without appointing a certain sum, this is a void award, and the party is not obliged to give a bond to the value of the land: for then the sense of the award must be supplied by averment: now if it has the credit of a judgment, there can be no interpretation made of the award, but by the words of the award itself: for if it receives its meaning from any matters out of the award, the mind of the arbitrators is only guessed at, and not expressed: but the parties intended to be obliged only by what the arbitrators themselves declare to be their award; and were the bond to be according to the value, they cannot assign their power to any person to assess the value. *Samon's* case, 5 Co. 78; *S. C. Samon* v. *Pitt*, Cro. Eliz. 432; Dyer, 242 a, (51). *Martham* v. *Jemx*, Yelv. 97.

Instances of awards being void for uncertainty.

Thus, if the arbitrators award that one party shall give security to the other for the payment of 16*l.*, this is not a good award, because it does not appear what security, whether by bond or otherwise. *Thinne* v. *Rigby*, Cro. Jac. 314, *S. C.* Jenk. 348. *Tipping* v. *Smith*, 2 Str. 1024, S. P. So an award "that the defendant shall deliver certain goods particularly

sex, Barrister at Law, *send greeting*. WHEREAS [A. B.], of ——, in the county of Southampton, Esq., by his

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named, and three boxes, and *several* books," without naming the books, is uncertain: the books should have been particularly described, unless it had been said that the books were within the boxes, by which they would have been sufficiently ascertained. *Cockson* v. *Ogle*, 1 Lutw. 550. So an award, "that one of the parties shall deliver up to the other a certain writing obligatory, or a certain bill obligatory, which he had before," is altogether uncertain, for it does not say of what sum, or of what penalty the bond is, or of whom it was obtained. *Bedam* v. *Clerkson*, 1 Ld. Raym. 123.

Recital of cross bonds,

So an award that the defendant shall pay to the plaintiff such a sum of money, unless within twenty-one days (which in fact was after the time limited for making the award) the defendant shall exonerate himself by affidavit from certain payments and receipts, in which case he was only to pay a certain other less sum, is illegal and void, being uncertain and inconclusive. *Pedley* v. *Goddard*, 7 Durnf. & East, 73.

But the certainty of an award may be judged of according to a common intent, and consistent with fair and reasonable presumption: therefore, where the submission was in general terms, "of *all* actions, controversies, and suits between the parties," and the arbitrator recited *one* which was in fact depending, referring to the submission as authorizing him to determine it, the award was holden sufficiently certain, for there was no probable presumption of any other cause of complaint, the parties not having desired to be heard upon any more than that one. *Hawkins* v. *Colclough*, 1 Burr. 277. And an award that two persons shall pay a debt in proportion to the shares which they held in a certain ship, the *ratio* of their shares not being a subject of dispute, is sufficiently certain. *Wohlenberg* v. *Lageman*, 6 Taunt. 254; 1 Marsh. 579, *S. C.* [Where, however, under a reference by order of *Nisi Prius* the arbitrator was to direct at what price the defendants, or A. B., who for that purpose became a party to the submission, should purchase a piece of land, and he awarded that it should be purchased by the defendants, *or* A. B., it was held that the award was bad for uncertainty, and could not be enforced by attachment. *Lawrence* v. *Hodgson*, 1 You. & Jerv. 16.

But certainty to a common intent is sufficient.

An award, that "there is nothing due to the plaintiff," and not (as it ought to be) that "there *was* nothing due at the time when the action was commenced," is sufficient; as it is to be presumed that things remain *in statu quo* from the time of the submission. *Dickins* v. *Jarvis*, 5 Barn. & Cress. 528; *S. C. nom. Dickins* v. *Smith*, 8 Dowl. & Ryl. 285. And where there are several counts in the declaration, and the arbitrator finds generally that the plaintiff has good cause of action for a certain sum, and directs a verdict to be entered for the plain-

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bond, bearing date on or about the 22d day of March last past, became bound to [C. D.], of the same place, Gentle-

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tiff, without saying on what count, this is sufficient, and it is not necessary that he should specify the count to which the pleading applied. *Dicas* v. *Jay*, 5 Bing. 281.

[Where an arbitrator merely finds a debt to be due, but does not in terms order the debtor to pay it, no attachment can be obtained for non-payment. *Edgell* v. *Dallimore*, 3 Bing. 634.

[Where a reference was made by rule of Court, on motion, after declaration and before plea, and the arbitrator directed a verdict to be entered for the plaintiff for a certain sum, it was held that this direction being wrong, as a verdict could not be entered except on a reference from *Nisi Prius*, the award was bad, and could not be supported as an award finding so much money to be due, the whole of the award consisting in the direction to enter the verdict. *Jackson* v. *Clarke*, 1 M'Clel. & You. 200.]

What awards are sufficiently final.

An award which settles the costs on both sides is final. *Hartnell* v. *Hill*, Forrest. 73. So is also an award that certain actions be *discontinued*, and each party pay his own costs; this being in effect an award of a *stet processus*. *Blanchard* v. *Lilly*, *Rex* v. *Blanchard*, 9 East, 497. And an arbitrator, to whom all actions and causes of action, and all matters in difference in two actions, between the parties, have been referred, is not compelled to take matters of an equitable nature into consideration; but an award made by him in reference to the two actions only, is final. *Craven* v. *Craven*, 7 Taunt. 644; 1 Moore, 403, *S. C.* But notwithstanding the award be final as to all matters referred and decided upon by the arbitrators, yet upon a reference of all matters in difference between the parties, an award does not preclude the plaintiff from suing for a cause of action existing against the defendant at the time of the reference, upon proof that the subject matter of such action was not laid before the arbitrators, nor included in the matters referred. *Ravee* v. *Farmer*, 4 Durnf. & East, 146.

[*14] *Martin* v. *Thornton*, 4 Esp. N. P. C. 180. But it is otherwise if it * was plainly within the terms and scope of the reference. *Smith* v. *Johnson*, 15 East, 213. Therefore, upon a reference of all actions, controversies, &c., and also of two distinct matters of difference, if the arbitrator omit to decide one of such distinct matters, that vitiates the whole award, which cannot therefore be enforced by attachment. *Randall* v. *Randall*, 7 East, 80. So where the parties having submitted all matters in difference to arbitration, and the arbitrator determined all matters except one, and gave liberty to one of the parties to prosecute that matter if he chose, it was held that the award was bad *in toto*. *Bradford* v. *Bryan*, Willes, 268; 7 Mod. 349, *S. C.* *Gray* v. *Gwennap*, 1 Barn. & Ald. 106, *post*, p. 18, n. (*c*). [See also *Middleton* v. *Wikes*, 1 Roll. Ab. 256. *Hawkins* v. *Colcconsh*, 1 Bac. Ab. 141.

What awards are not sufficiently final.

man, in the penal sum of 2,000*l.*: *And* the said [C. D.], by his bond, also bearing date on or about the 22d day of

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[But it is not necessary that arbitrators in their award should distinctly refer in terms to the several points submitted to them, nor to shew the steps by which they have arrived at a conclusion. Thus, if the subject of dispute be as to the value of certain property received by the respective parties, and the proportion in which they should contribute towards the payment of a certain sum of money; and the arbitrators, instead of finding distinctly as to each of these points, state generally that they have taken the matters in difference into consideration, and award that one party shall pay to the other a certain sum, this is sufficient. *Aitcheson* v. *Cargey*, 9 J. B. Moore, 381. Where the objection to an award is purely of a technical nature, and is inconsistent with the plain moral justice of the case, the Court will not readily lend its assistance to set it aside. Thus where an action was referred, which was brought upon an agreement which contained an agreement that, in case of the breach of an agreement, one of the parties should pay to the other the sum of 100*l.* to be recovered as a stipulated debt, and not as a penalty; the arbitrator awarded 10*l.* only for damages, and it was contended that he ought to have awarded the whole sum of 100*l*, the parties having themselves assessed the damages at this sum (as to this, *vide post*, p. 444); but the Court refused to set aside the award, on the ground of the unconscientious nature of the objection, and its not being proved that the attention of the arbitrator was drawn to the clause in question. *Pinkerton* v. *Caslon*, 2 Barn. & Ald. 704.]

Not necessary to refer expressly to the several points submitted.

Courts disinclined to entertain technical objections.

An award between a lessee and his neighbour, awarding an act to be done for the benefit of the latter by the lessee, which would be waste upon the estate of lessor, is bad. *Alder* v. *Savile*, 5 Taunt. 454.

An award is void, if the performance of it would be a forfeiture of the party's estate.

[Another requisite of an award, of course, is, that the matters which it directs to be done are within the scope of the arbitrator's authority. Thus, where parties had entered into an agreement, dated 19 Jan. 1801, for a lease of a colliery for sixty-three years; the lessees to be allowed three years from 1st May, 1801, for winning the colliery without paying any rent; and it was referred to an arbitrator to settle the terms of a lease according to the agreement: and he directed a lease to be made from the 1st of May, 1804, it was held that he had exceeded his authority, and the award was therefore bad. *Bonner* v. *Liddell*, 1 Brod. & Bing. 80.]

An award however may be good in part, and bad in part, provided the latter be independent of and unconnected with the former. *Storke* v. *De Smeth*, Willes, 66; *Johnson* v. *Wilson*, Willes, 253; *Hartnell* v. *Hill*, Forrest. 73; *George* v. *Lousley*, 8 East, 13. 2 Tidd's Prac. 861, 7th ed.; [*Hooper* v. *Hooper*, 1 M'Clel. & You. 509.] Thus, if amongst a variety of things appointed by an arbitrator to be done, there be one or two of which

An award may be good in part, and bad in part, if the latter be independent of and unconnected with the former.

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March last past, became bound to the said [A. B.] in the penal sum of 2,000*l.*; *Which* said bonds respectively recite

which recited an ejectment and a

performance would be impossible, unlawful, or unreasonable; or extending to persons or to objects beyond the scope of the submission; in such case the mere existence of the direction in the award, though compliance with it be out of the question, does not of necessity nullify the whole. The general validity is alone impaired, when by the particular defect a mutuality of interest and advantage, appearing evidently to have been intended by the arbitrator to be given, is destroyed; or where the general substance of the award, and the real justice of the case, are affected. Caldwell on Arbitration, 116. Thus, where it was awarded that one party should pay to the other a certain sum of money, and should also pay the costs of the arbitration; and then, that each party should give a release to the other; the Court held, that since no specific authority as to the costs of reference had been vested in the arbitrators by the submission; and it being a matter arising subsequent to the time of the submission, that part of the award which concerned the costs of the reference was bad, but that the whole award was not on this account to be rejected. *Candler* v. *Fuller*, Willes, 64; S. P. *Fox* v. *Smith*, 2 Wils. 267; *Addison* v. *Gray*, 2 Wils. 293; *Bargrave* v. *Atkins*, * 3 Lev. 413; *Pinkeny* v. *Bullock*, 2 Lev. 3, 2 Wms. Saund. 293, (1). [Again, where an action was referred to an arbitrator, and the rule of reference stated that if the arbitrator should award that the plaintiff had any cause of action, he should have costs as in a court of law, but if he should award otherwise, then the defendant was to have his costs. The arbitrator by his award directed that the defendant should give up the premises to the plaintiff, that he should pay the costs of the action, and pay 4*l.* 1*s.* for the loss of rent during the time that he held over; but did not award that the plaintiff had any cause of action. The arbitrator also directed that, on performance of the award, each of the parties should, at the charges of each other, execute releases from the beginning of the world to the day of the date of the award. It was objected that the arbitrator ought to have found that the plaintiff had a good cause of action, and that the direction to the parties to execute mutual general releases, was bad, as exceeding their authority, and vitiated the whole award: on the former point, the Court held, that the arbitrator was not bound to state that which was a necessary consequence of his award, namely, that the plaintiff had a cause of action; the Court also determined that the award was void as to that part which related to the releases, but was not affected thereby as to the other parts of it. *Doe* d. *Williams* v. *Richardson*, 8 Taunt. 697. So, where one of the points referred to the arbitrators was, to determine the sums which the parties should respectively contribute towards the costs incurred in bringing and defending certain actions; and the reference em-

Instances of awards being void *pro tanto* only.

[* 15]

that an action of ejectment was tried at the summer assizes, 18—, at Winchester, in the said county of South-

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braced other objects, it was held that though the award was void as to the costs, in declaring that sums paid by some of the parties on account of the suits, *or in any way connected therewith* † should be considered as part payment of the share to be borne by them, being an excess of their authority, yet that this did not invalidate the award as to the other matters referred. *Aitcheson* v. *Cargey*, 9 J. B. Moore, 381.] So, where an award directed that a lease for life should be made to a party to the submission, with remainder to a stranger to the submission, in fee, the latter part was declared to be totally void; but that the rest of the award was not, on that account, the less valid. *Bretton* v. *Pratt*, Cro. Eliz. 758. So, where an arbitrator awarded a sum of money to one party, and having stated in the award his reasons for conceiving so much to be due, it appeared that part of the supposed debt took its rise from an illegal transaction; the Court ordered so much to be struck out of the sum awarded, but without prejudice to the rest of the award. *Aubert* v. *Maze*, 2 Bos. & Pul. 371. So, where the submission being of *all matters* in difference between the parties, an award of so much to be paid by the defendant to the plaintiffs on their *banking account*, and for which sum the plaintiffs were to give the defendant a release, is binding between them; for no other matter in difference between them shall be intended, unless it be shewn; and the award is good for so much, though the arbitrators also awarded a sum to be paid by the plaintiffs to the defendant out of a partnership fund, in which others than the defendant were interested, who were no parties to the submission. *Ingram* v. *Milnes*, 8 East, 445. So, if an award be made between A. of the one part, and B. of the other, by which it is awarded that A. should pay 10*l.* to B., and also that A. should pay 5*l.* to a stranger, and that B. should give A. a general release; here the award to pay 5*l.* to the stranger is void, and yet the award is good for the residue; for B. is not prejudiced though the 5*l.* be not paid to the stranger, for no more than 10*l.* was intended for him or his benefit. *Argu. Pope* v. *Brett*, 2 Saund. 293; S. P. *Samon* v. *Pitt*, 1 Roll. Abr. 259, pl. 8. Cro. Eliz. 432, *S. C.* But if the arbitrators award A. to pay B. 100*l.* and award A. and B. to give general releases to each other, and then award B. to pay A. 20*l.* at a subsequent time, the whole award is bad. So, if the arbitrators award A. to pay B. 30*l.* on the first of January, and B. to pay A. 10*l.* on the first of February, the whole is bad; such award

verdict for the plaintiff,

The part of an award to be performed by or to a stranger, is void.

An award that A. shall pay B. a sum, and B. pay A. a less sum at a subsequent day, is void.

[† To avoid questions of this nature, an award should always be framed in as strict adherence as possible to the terms of the agreement to refer.]

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ampton, wherein *John Doe*, on the several demises of the said [C. D.] and others, was the plaintiff, and the said

being quite inconsistent with common sense. *Storke* v. *De Smeth*, Willes, 69.

If one of the parties cannot have the advantage intended him, as a recompence for what he is to do to the other, the award is void *in toto*.

But if, by the nullity of the award in any part, one of the parties cannot have the advantage intended him as a recompence or consideration for that which he is to do to the other, the award is void in the whole. 1 Roll. Abr. 259, pl. 9, 10, S. P. Com. Dig. *Arbitrament*, (E. 19.); See *Birks* v. *Trippet*, 1 Saund. 32; *Veale* v. *Warner*, 1 Saund. 324; *Hodsden* v. *Harridge*, 2 Saund. 61; *Coppin* v. *Hurnard*, 2 Saund. 127. Wms. n. 2 Saund. 293, (1). Therefore, an award that A. shall be paid by B. money due for task work, and then A. should pay 25*l*. to B., and that the parties should give each other a general release, is void in the whole, for the uncertainty what sum should be paid for task work. *Pope* v. *Brett*, 2 Saund. 292.

Award void by revocation of arbitrator's authority.

[Another ground upon which the performance of an award may be resisted is, that the authority of the arbitrators had been previously revoked by the act of the party, which is a good defence to an action for the recovery of a sum awarded, (*vide ante*, Vol. 2, p. 580), though the act of revocation is a breach of the bond or agreement of submission, and may be the subject of an action. *Vynior's* case, 8 Rep. 162; *Warburton* v. *Storr*, 6 Dowl. & Ryl. 213, *S. C.* 4 Barn. & Cress. 103; *Brown* v. *Tanner*, M'Clel. & You. 464; and see *Marsh* v. *Bulteel*, 5 Barn. & Ald. 507. And upon the same principle, the marriage of a *feme sole*, which also operates as a revocation, is a breach of such a bond or covenant; *Charnley* v. *Winstanley*, 5 East, 266; but bankruptcy is not a revocation. *Andrews* v. *Palmer*, 4 Barn. & Ald. 250. Where the submission has been made a rule of Court, the revocation of the arbitrator's authority is a contempt of Court. See *Harcourt* v. *Ramsbottom*, 1 Jac. & W. 511. *Hagget* v. *Welsh*, 1 Sim. 134. An application for a rule for setting aside an award will not, it seems, be entertained on the ground that the authority of the arbitrators has been revoked, since, as it is a nullity, the performance of it cannot be enforced, unless where the reference has been made by order of Nisi Prius, and a verdict has been entered for one of the parties; and the consequence, therefore, of the non-interference of the Court would be, that the party might obtain judgment on the verdict, and take out execution. In such a case the Court will grant a rule for setting aside the award. *Doe* d. *Turnbull* v. *Brown*, 5 Barn. & Cress. 384; *S. C.* 8 Dowl. & Ryl. 100. In the case of *Clapham* v. *Higham*, 7 J. B. Moore, 403, *S. C.* 1 Bing. 87, however, the Court of Common Pleas seems not to have adverted to the distinction in question, but granted a rule for setting aside the award, on account of the revocation of the arbitrator's authority,

Marriage of a *feme sole* a revocation: bankruptcy not.

Whether the revocation of the arbitrator's authority is a ground for setting aside the award.

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[A. B.] was defendant; *And* that upon the trial of the said action, a verdict was given for the plaintiff, and judgment entered up thereupon, and possession delivered to the said [C. D.] by the sheriff of the said county of Southampton, in execution of a writ of possession; *And* that the said [C. D.] had called upon the said [A. B.] for the payment of six years mesne profits of the lands and tenements recovered in the said action; and also for the value of the wind-mill, which was, as was alleged by the said [C. D.], taken down after the verdict was given, and before the possession was delivered by the sheriff as aforesaid; *And* that differences had arisen, and were depending between the said [C. D.] and the said [A. B.], as to the said mesne profits and wind-mill; *And*, that the said parties had agreed to refer the same to the award, judgment, and determination *of me the said [*arbitrator*], an arbitrator indifferently chosen by and between the said parties, to award, arbitrate, and determine concerning the same: *Under* which said bonds, conditions were respectively written for making the same void, if the said [A. B.] and [C. D.] respectively, and their respective heirs, executors, and administrators, should well and truly stand to, observe, perform, fulfil, and keep the award, arbitration, judgment, final end, and determination which I the said [*arbitrator*] should make and give, in, and concerning the said matters in difference between the said parties; and all actions, suits, and causes of actions and suits, debts, dues, damages, claims, and demands whatsoever, concerning the same; *So as* the award of me the said [*arbitrator*], should be made and set down in writing under my hand, ready to be delivered to the said parties in difference, or such of them as should require the same, on or before the first day of May then next ensuing; or, on or before such further day, to which I, the said [*arbitrator*], should think proper to enlarge the time for making my award, not exceeding the first day of July then next; *As* by the said obligations and the conditions thereunder written, reference being thereto respectively had, will (among

and that lessor of plaintiff had demanded mesne profits, and the value of a wind-mill removed before execution of writ of possession:

and that differences had therefore arisen;

and that parties had agreed to refer same to arbitrator.

[*17]

Conditions of bonds, to abide by award, concerning the matters in difference;

so as the award should be made by a given day,

or on or before an enlarged limited time.

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although it is not stated that the party against whom the application was made, had a verdict in his favour.]

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other things) more fully appear. And whereas, before the said first day of May, I the said [*arbitrator*] did, in pursuance of the said power, enlarge the time for making this my award until the 30th day of this present month of June (*b*). Now know ye, *That* I the said [*arbitrator*], having taken upon myself the burthen of the said reference, and having heard and duly considered the allegations of the said parties respectively; *and not having been requested to examine any witnesses on behalf of either of the said parties, do make and publish this my award in writing, of and concerning the matters to me referred, in manner following: that is to say; I *do* award and adjudge that the said [A. B.] shall and do forthwith pay to the said [C. D.], the sum of 100*l.*: *And* that the same be received by the said [C. D.] in full satisfaction and discharge of and for all the said matters in difference (*c*) to me referred, as aforesaid. In witness, &c.

Recital of arbitrator having enlarged the time for making his award.

Testatum.

[*18]

Award that defendant shall pay lessor of plaintiff 100*l.* in full discharge of the matters referred.

To bring a party into contempt for non-performance of an award made during an enlargement, the affidavit must state the time of the execution, &c.

(*b*) Where the arbitrators have power to enlarge the time for making their award, and have enlarged it, and made their award in the additional time; in order to bring the defendant into contempt for non-performance of the award, there must be an affidavit that the time has been enlarged, that the award was made within the enlarged time, [*Hilton* v. *Hopwood*, 1 Marsh, 66], and that the defendant has been previously served with notice of those facts. [And where the time has been enlarged by a judge's order, it should be shewn that such order was made by consent. *Halden* v. *Glasscock*, 5 Barn. & Cress. 390. But where the arbitrator had power to enlarge the time for making his award by indorsement on the order of reference, and the order with two such indorsements was made a rule of Court, it was held not to be necessary to state in the affidavit, upon which the application for an attachment was grounded, that the time had been duly enlarged by the arbitrator, as the Court must be presumed to have had a proper affidavit of the fact in granting the rule. *Dickens* v. *Jarvis*, 5 Barn. & Cress. 528.] And, it seems, that the affidavit for an attachment for non-performance of an award, must, contrary to the usual practice, always state the time of the execution of the award. *Wholenberg* v. *Lageman*, 6 Taunt. 251; 1 Marsh. 579, *S. C.* As to enlargement, *vide ante*, Vol. 2, p. 631.

The award need not state that it is made concerning the matters in difference, but

(*c*) Upon the trial of an action of tort, a verdict was found for the plaintiff, subject to a reference of all matters in difference; the defendant claimed before the arbitrator a sum of money due to him upon the balance of an account, which was admitted by the plaintiff to be due: the

award, without stating that it was made *of and concerning the premises*, directed a verdict to be entered for the plaintiff, with damages; and as the award recited, that all matters in difference between the parties were referred to the arbitrator, it was held that this award was sufficient. *Gray* v. *Gwennap*, 1 Barn. & Ald. 106. However, it is prudent to state that the award is made *de premissis*. As to the words "*de premissis*," in pleading awards, *vide* Wms. n. 1 Saund. 324, (2). [It is a fatal objection to an award, that, upon the face of it, it does not decide all the matters in difference agreeably to the terms of the reference. *Winter* v. *Munton*, 3 J. B. Moore, 723.]

it is prudent to state it.

[19]

AWARD *by two Arbitrators, under cross Bonds, on a general Reference by A. B. and C. D., two Copartners, That A. B. shall pay a Sum of Money to C. D., and give him a* GENERAL RELEASE; *that the Implements, &c. in a Sail-Cloth Manufactory shall become the Property of A. B.; and that the Copartnership Debts shall be got in, and equally divided.*

BETWEEN COPARTNERS, OF PAYMENT, GENERAL RELEASE, &c.

TO ALL TO WHOM THESE PRESENTS SHALL COME, WE [*two arbitrators*], of &c., *send greeting*. WHEREAS divers differences and disputes have arisen, and are now depending, between [A. B.], of &c., and [C. D.], of &c., touching and concerning &c. (*set forth the matters in dispute briefly*). AND WHEREAS, for the purpose of putting an end to, and determining the said differences and disputes, the said [A. B.] and [C. D.] have bound themselves each to the other, in the sum of one thousand pounds of lawful money of Great Britain, by several bonds or obligations, bearing date respectively on or about the fourth day of May last, conditioned respectively to be void upon their respectively observing and performing the award, arbitration, and determination of the said [*two arbitrators*],

Recital of differences between two copartners.

Recital of cross bonds of submission to the award of two arbitrators, on a general reference,

BETWEEN CO-PARTNERS, OF PAYMENT, GENERAL RELEASE, &c.

arbitrators indifferently named, elected, and chosen, as well on the part and behalf of the said [A. B.], as of the said [C. D.], to arbitrate, award, order, judge, and determine of and concerning all and all manner of action and actions, cause and causes of action, suits, bills, bonds, specialties, covenants, contracts, promises, accounts, reckonings, sum and sums of money, judgments, executions, extents, quarrels, controversies, trespasses, damages, and demands whatsoever, at any time theretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed, or depending by and between the said parties, or either of them; and so as the said award should be *made in writing, under the hands and seals of the said arbitrators, and ready to be delivered to the parties in difference, on or before the first day of January now next ensuing. Now know ye, that we, the said [*two arbitrators*], having heard and carefully attended to, and considered the several allegations of the said parties in difference, and also having duly examined, attended to, and carefully considered the allegations and evidence of the several witnesses of the said parties in difference, and the several books of account, and other vouchers produced by them, and laid before us, *Do*, by these presents, award and order, *That* the said [A. B.] shall and do, on the twentieth day of January now next ensuing, between the hours of ten and twelve in the forenoon of the same day, and at or in the dwelling-house of &c., pay, or cause to be paid, the sum of (two hundred pounds) of lawful money of Great Britain, unto the said [C. D.], his executors or administrators, or to such person or persons as he or they, by any note or writing under his or their hand or hands, shall appoint to receive the same; such note or writing to be, previously to such payment, produced and shewn to the said [A. B.], and to be, immediately after such payment, delivered to him. And we do also award and order, that the said [A. B.] shall, at his own expense, prepare, and in due form of law, execute, in the presence of two or more credible witnesses, who shall thereunto subscribe their names, as witnesses attesting the execution of the same, a release to the said [C. D.], his heirs, executors, administrators, and assigns, of all, and all man-

so as the award be made by a given day.

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Testatum.

Award of payment of a sum by A. B. to C. D.

and a general release to be given by A. B. to C. D.

BETWEEN CO-PARTNERS, OF PAYMENT, GENERAL RELEASE, &c.

ner of action and actions, &c. (*ut ante*, p. 4,) whatsoever, which he the said [A. B.], at the date and execution of the said several bonds or obligations, had, or might, or could have had, claimed, challenged, or demanded against the said [C. D.] for or on account of all or any of the matters and things thereby submitted to our award and arbitration as aforesaid: *And* the said release being so executed, attested, and subscribed as aforesaid, he the said [A. B.] shall give and deliver, or cause to be given and delivered, the same unto the said [C. D.], his executors or administrators, on the day, and at the time and place aforesaid. AND we do award and order, that all the implements, utensils, * and materials belonging to the said [A. B.] and [C. D.], as copartners in the Sail-Cloth Manufactory which they now carry on at —— aforesaid, shall from henceforth be and become the sole property of the said [A. B.], and be held and enjoyed by him as such, exclusive of the said [C. D.]. AND LASTLY, we do award and order, that all debts, and sums of money, now due and owing to the said [A. B.] and [C. D.], as copartners, and which are still remaining unpaid and unsatisfied, shall be got in, collected, recovered, and received, as soon as conveniently may be after the date of these presents: *And*, that after deducting the costs and expenses attending the collecting, recovering, and getting in the said debts, and sums of money, the money to arise from thence shall, as to one moiety thereof, belong and be paid to the said [A. B.], his executors, administrators, or assigns; and the other moiety thereof to the said [C. D.], his executors, administrators, or assigns. IN WITNESS, &c.

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Implements, &c. in a sail-cloth manufactory to become the property of A. B.

Copartnership debts to be got in, and

equally divided.

ACTION TO CEASE, PAYMENT, AND GENERAL RELEASE.

AWARD (*a*) *that an Action shall cease; that A. B. shall pay C. D.* 103*l.* *with Costs of the Action, to be taxed by the Officer of the Court, and* 6*l.* *a Moiety of the Expenses of the Award, by Instalments, viz.* 43*l.*, *part of the* 103*l.* *with the Costs, and* 6*l.* *on the First of February next; and* 60*l.* *on the First of April next: that C. D. shall, within Ten Days after Payment of the* 60*l.* *execute a general Release to A. B.; if such Release should be prepared at A. B.'s Costs, and tendered: that if Default be made in Payment, the Money shall become instantly due, and that C. D. may immediately sue for it.*

Award that an action shall cease: that A. B. shall pay C. D. 103*l.*

(*AFTER reciting the action and submission, the award proceeds thus:*) I DO award, order, and direct, *That* the said action at law shall cease, and be no further prosecuted: AND that the said [A. B.], his executors or administrators, shall and do pay to the said [C. D.], his executors or administrators, or such other person as he or they shall or may lawfully authorize to receive the same, at the office of [Messrs. E. and F.], attornies at law, in Lincoln's Inn, the sum of 103*l.* together with the costs of the said action, to be taxed by the proper officer of the said court; *And* the further sum of 6*l.* as and for one moiety of the expenses of this my award, at the times and in manner following: that is to say; the sum of 43*l.* parcel of the said sum of 103*l.*, together with the costs of the said action, and the said sum of 6*l.*, on the first day of February now next ensuing, between the hours of twelve and two in the afternoon; *And* the further sum of 60*l.* on the first day of April now next ensuing, between the same hours: AND I do further award,

with taxed costs of action; and 6*l.* for moiety of expenses of award, by instalments, viz. 43*l.*, part of the 103*l.* with the costs, and 6*l.* on the 1st Feb. next; and 60*l.* on the 1st of April next:

(*a*) The circumstance that an award was prepared by the solicitor of one of the parties, though indelicate, is no ground for setting aside the award. *Fetherstone* v. *Cooper*, 9 Ves. 68. Kyd on Awards, 349, 2d ed.

The solicitor of one of the parties may prepare the award.

order, and direct, that the said [C. D.], his executors or administrators, shall and do, within ten days after payment of the said last-mentioned sum, seal and deliver to the said [A. B.], his executors and administrators, a general release of all actions, claims, and demands, up to the day of the date of the said submission, if such release, prepared at the costs of the said [A. B.], his executors or administrators, should be tendered or left for him at the said office, on the said first day of May, at the time of the payment of the said last-mentioned sum of 60*l.*: And lastly, I do order, award, and direct, that if default should be made in payment of all, either, or any part of the sums of money herein by me directed to be paid, at the place and times in that behalf appointed, then and thenceforth all the monies directed herein to be paid, or so much thereof as shall be then unpaid, shall become instantly due and payable; *And* that the said [C. D.] his executors or administrators, may immediately use such lawful means for obtaining payment thereof, as he might have done if the whole of the said sum of 103*l.*, together with the several costs aforesaid, or such part thereof as shall then remain unpaid, had been herein directed to be paid, on the day at which such default shall happen to be made. In witness, &c.

ACTION TO CEASE, PAYMENT, AND GENERAL RELEASE.

that C. D. shall, within ten days after payment of the 60*l.* execute a general release to A. B.;

if such release should be prepared at A. B.'s costs, and tendered;

that if default be made in payment, the money shall become instantly due;

and that C. D. may immediately sue for it.

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AWARD *that a Sum is due to a Solicitor; that he has a Lien upon the Client's Papers for it; that the Sum be paid on &c., and that the Solicitor accept it, in full of all Demands for the Business referred.*

BETWEEN SOLICITOR AND CLIENT.

Now know ye, that I, the said [*arbitrator*], having heard, &c. *Do* by these presents award and adjudge, that at the date of the said submission, there was, and now is, due and owing to the said [A. B.] by the said [C. D.], for and

Award that a sum is due to a solicitor.

BETWEEN SOLICITOR AND CLIENT.

upon the several matters referred to me as aforesaid, the sum of —— pounds, and no more. And I do further award, that the said [A. B.] has a lien (*a*) upon all deeds, papers, and writings in the custody or possession of him the said [A. B.], belonging or relating to the affairs of the said [C. D.] for the payment of the said sum of —— pounds. (*Add award and order that C. D. pay, on &c., at &c., the said sum of* ——, *&c., ut ante*, p. 20:) And I do further award and order, that the said [A. B.] shall accept of, and receive from the said [C. D.], the said sum of —— pounds, in full satisfaction of all demands for such business done and money due, paid, laid out, and expended, as is hereinbefore mentioned. In witness, &c.

that he has a lien upon the client's papers for the sum:

that the sum be paid: and that the solicitor accept the sum, in full of all demands for business referred.

A solicitor has a general lien on all papers, excepting what he receives in another character.

(*a*) Although a solicitor has a lien on all papers delivered to him in that character, not only for professional business in the matter of the papers, but for all professional business whilst they remain in his hands; yet he has no lien, as solicitor, on papers which he receives as steward of a manor. *Champernown* v. *Scott*, 6 Madd. 93. [*Balch* v. *Symes*, 1 Turn. 87]. *Vide ante*, Vol. 2, p. 472, n. (*d*). [So a solicitor's lien on papers is superseded by taking security for his bill for business done in the matter of the papers. *Cowell* v. *Simpson*, 16 Ves. 275. *Sed vide post*, Vol 5, p. 367.]

Solicitor's lien on papers superseded by taking security.

[A solicitor, who refused to allow a deed in his possession to be proved on behalf of the plaintiff, because he had a lien on it for costs due from the defendant, was ordered to produce the deed at his own expense, and to pay all the costs consequent on his refusal. *Brassington* v. *Brassington*, 1 Sim. & Stu. 455. *Note by Mr. B.*]

[It has lately been decided that an attorney is not entitled to retain the drafts and copies of deeds prepared by him, but is bound to deliver them up to the client who has paid for them. *Ex parte Horsfall*, 7 Barn. & Cress. 528. And, on this principle, Sir John Leach, V. C., lately refused to order the papers of a partnership firm of solicitors, one partner in which had become bankrupt, to be delivered up to the solvent partner by the assignees; his Honour observing, that he had no right to order the papers of the clients to be delivered to one of the partners without the consent of the clients. *Davidson* v. *Napier*, 1 Sim. 297. See further as to solicitor's lien on deeds and papers, *post*, Vol. 5, p. 367.]

Drafts, &c. of deeds, the property of the clients.

ON BREACHES OF HUSBANDRY COVENANTS.

AWARD (*a*) *by Three Arbitrators, on a Submission of Breaches of Husbandry Covenants, that the Lessee shall pay the Receiver of the Estate a certain Sum for Damage, which the Arbitrators find to have been occasioned by the Lessee's having farmed contrary to the Four Years' Course of Husbandry, and by Breaches of Covenants: such Sum to be accepted by the Receiver as a full Compensation: the Costs of the Reference to be paid by the Lessee: the Damages, and Costs of Reference, to be paid by the Lessee to the Receiver, by Two Instalments: the Lessee, during the Remainder of the Term, to farm according to the Course of Husbandry mentioned in a Schedule: and the Lessee, at his own Expense, to enter into a Deed of Covenants with the Receiver, to farm accordingly.*

Exordium.

TO ALL TO WHOM THESE PRESENTS SHALL COME, WE [*arbitrator*], of ——, in the county of ——, farmer; [*second arbitrator*], of ——, in the same county, farmer; and [*third arbitrator*], of ——, in the same county, farmer, *send greeting.*

Recital of lease of a farm;

WHEREAS by indenture of lease, bearing date on about the —— day of ——, 18—, and expressed to be made between [*lessor*], esquire, since deceased, of the one part; and [*lessee*], of ——, in the said county of ——, farmer, of the other part; the said [*lessor*] *Did* demise and let unto the said [*lessee*], his executors and administrators, a certain messuage, called, &c. *(Recite the Remainder of the Lease, Lessor's Death, and*

Lessor's death, and appointment of receiver.

(*a*) See the submission on which the above award is founded, *ante*, Vol. 2, p. 615.

Reference to other forms, relating to the above award.

See a deed of covenants in pursuance of the award, *post*, COVENANT, title AWARD, p. 149.

ON BREACHES OF HUSBANDRY COVENANTS.

Recital that lessee did not follow the six years' course of husbandry prescribed by the lease;

Appointment of Receiver, ut ante, Vol. 2, p. 616). And whereas the said [*lessee*] did not farm or cultivate the said arable lands, part of the said farm, according to the course prescribed by the said recited covenant (and which is called the six years' course of husbandry), the said [*lessor*] having in his lifetime, as he the said [*lessee*] alleged, agreed to dispense with the said covenant, and to permit the said [*lessee*] to farm the said lands in the course of husbandry called the four years' course. And whereas the said [*receiver* (*b*)] (allowing the said [*lessee*] the full benefit of the permission so stated to have been given to him as aforesaid) alleged that the said [*lessee*] had not farmed or cultivated the said lands according to the said four years' course of husbandry; and also that he had done, or omitted to do, divers acts, matters, and things, contrary to and in breach of the other covenants, conditions, and agreements contained in the said indenture of lease, whereby the lands so demised to him as aforesaid had sustained great damage and injury: *And* in consequence of such breaches, or alleged breaches, by the said [*lessee*], of such covenants as aforesaid, the said [*receiver*] threatened to commence an action of ejectment against the said [*lessee*] for the recovery of the possession of the said premises. And whereas, in order to prevent such action as aforesaid, the said [*lessee*] proposed to the said [*receiver*], and the said [*receiver*] consented and agreed, that it should be referred to us, or any two of us (*c*), to settle and determine by our award, whether any, and what damage had been occasioned to the said farm and

the lessee alleging that the lessor agreed to permit the four years' course:

that the receiver allowing such permission, alleges that the lessee has not followed the four years' course;

and that he had broken other covenants, whereby the premises had sustained damage:

for which breaches, receiver threatened to commence ejectment:

and that to prevent ejectment, lessee proposed, and receiver consented, to refer to three arbitrators, or any two of them, the question, whe-

(*b*) A Chancery receiver cannot submit breaches of a lease, without the Court's order. *Vide ante*, Vol. 2, p. 615, n. (*a*); p. 426, n. (*l*).

Two arbitrators may make an award, if the third, after notice, absents himself.

(*c*) When a cause is referred to three persons, and they, or any two of them, are empowered to make an award, although one of the three never attended any of the meetings of the referees, an award made by two of them is good, if the third had due notice of the several meetings appointed, and of the several matters referred: but if he had no such notice, then such an award is bad. *Dalling* v. *Matchett*, Willes, 215; Barnes, 57, *S. C.* [Or if a submission be to three, or any two of them, and two by fraud or force exclude the other, that alone is sufficient to vitiate the award. *Burton* v. *Knight*, 2 Vern. 515. *Note by Mr. B.*]

hereditaments comprised in the said lease, in consequence or by reason of the said [*lessee*] having at any time or times, since the —— day of —— 18—, farmed, or * otherwise managed the same, contrary to the said four years' course of husbandry, or by reason or in consequence of the said [*lessee*] having, since the time aforesaid, committed any breach or breaches in, or otherwise acted contrary to any of the covenants, clauses, conditions, and agreements, in the said indenture of lease contained (except the covenant to farm in the six years' course hereinbefore recited, and except in all those cases in which it should appear to us, the said arbitrators, or any two of us, that the said [*lessee*] had acted pursuant to a permission given him by the said [*receiver*], or by the said [*lessor*], deceased): *And also* to settle and determine by our said award, what sum or sums (if any) should be paid by the said [*lessee*] to the said [*receiver*], as a compensation for such damages, and in what manner, and at what time and place the same should be paid: *And also* to direct by our said award, in what order, course, and manner the said premises should be farmed, managed, and carried on during the remainder of the said term of twenty-one years; *And* whether any, and what agreements, or other assurances, should be made or executed by the said [*receiver*] and [*lessee*], or either of them. And whereas in pursuance of the said agreement, the said [*receiver*] and [*lessee*] have become bound to each other by their several bonds or obligations in writing, bearing date on or about the —— day of —— last past, to stand to, obey, observe, perform, fulfil, and keep the award, arbitrament, judgment, final end, and determination of us the said [*three arbitrators*], which we, or any two of us, should make of and concerning the several matters and things so agreed to be referred to us as aforesaid: *And also* to pay all such sum and sums of money, and make and execute such agreement or agreements, or other assurances, as we, or any two of us, should, by our said award, order, direct, or appoint: *And* to make such payment or payments respectively, and every of them, at such time or times, place or places, and in such manner, as we, or any two of us, should, by our said award, order and direct: *And* to make and execute

ON BREACHES OF HUSBANDRY COVENANTS.

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ther any, and what damage, had been occasioned by lessee's having farmed contrary to the four years' course;

or by any breaches of covenants, (excepting as to the six years' course, and cases in which he has acted by permission of receiver or lessor);

to settle the sums to be paid for such damages;

and to direct the future course of husbandry;

and what agreements should be executed by lessee and receiver.

Recital of cross bonds to abide by award of three, or any two of them;

and to pay such sums, and execute such agreements, as arbitrators should award.

ON BREACHES OF HUSBANDRY COVENANTS.

such agreement or agreements, or other assurances, within the time or respective times to be thereby limited in that behalf (*d*). And *it was agreed* that the said costs and charges of the said bonds and obligations, and all costs, charges, and expenses of and attending, or incidental to the said arbitration and award, should be borne and paid by the said [*lessee*] and [*receiver*] jointly, or by either of them separately, as we, or any two of us, should by our said award direct. Now know ye, that we the said [*three arbitrators*], arbitrators as aforesaid, having taken upon us the charge of the said arbitration and award, and having heard and considered the allegations and proofs made, adduced, and brought before us by the said parties, *Do* make our award of and concerning the premises, in manner following: that is to say; First *We* do award, order, adjudge, and determine, that the said [*lessee*], his executors, administrators, or assigns, shall pay to the said [*receiver*] the sum of —— hundred and —— pounds of lawful money of Great Britain, as a full compensation and recompence for the damage, which we find and determine to have been occasioned to the said farm and hereditaments, in consequence and by reason of the said [*lessee*] having, since the —— day of ——, 18—, farmed, or otherwise managed the same, contrary to the said four years' course of husbandry; and in consequence and by reason of the breaches by the said [*lessee*] of the covenants and agreements in the said lease contained (except the said covenant, to farm in the six years' course of husbandry). And we do further award, order, adjudge, and determine, that the said sum of —— hundred and —— pounds, shall be accepted and taken by the said [*receiver*], as a full compensation and recompence for such damage accordingly, And we do also award, order, adjudge, and determine, that the costs and charges of the said bonds or obligations, and of and attending, or incident to, the said reference, arbitration, and award (which we do tax and assess at the sum of

Recital of agreement, that costs of reference should be borne jointly or separately, as arbitrators should award.

Testatum.

Award that lessee shall pay receiver a certain sum for the damage which the arbitrators find to have been occasioned by lessee's having farmed contrary to the four years' course, and by breaches of covenants (except six years' course):

such sum to be accepted by receiver as a full compensation:

the costs of reference to be paid by lessee:

The *ita quod* should be stated in the award.

(*d*) It is usual to add the *ita quod* in the award, in order that it might appear on the face of the award that it was made within the time limited. See the *ita quod* of the above submission, *ante*, Vol. 2, p. 619. And see further, *ante*, Vol. 2, p. 583, n. (*b*); p. 628, n. (*b*).

—— pounds in the whole), shall be paid by the said [*lessee*]: *And that* the said sum of —— hundred and —— pounds, the amount of such damages as aforesaid, and the sum of —— pounds, the amount of such costs, charges and expenses as aforesaid, shall be paid by him the said [*lessee*] to the said [*receiver*], in the proportions, and at the times and place next hereinafter mentioned; namely, that the sum of —— hundred pounds, part of the said sum of —— hundred and —— pounds, and the said sum of —— pounds, the amount of such costs, charges, and expenses as aforesaid, shall be paid by the said [*lessee*] to the said [*receiver*], at his dwelling-house, in —— aforesaid, on the —— day of —— now next ensuing; and that the sum of —— hundred and —— pounds, residue of the said sum of —— hundred and —— pounds, shall be paid by the said [*lessee*] to the said [*receiver*], at his said dwelling-house, in —— aforesaid, on the —— day of —— [which will be in the year] 18—. And we do also award, order, adjudge, and determine, that the said [*lessee*] shall henceforth, for and during all the remainder of the said term of twenty-one years, so granted to him by the said indenture of lease as aforesaid, farm, cultivate, and manage the said lands and hereditaments, as well pasture as arable, in the manner, according to the course, and with the succession and alteration of crops particularly mentioned, expressed, and declared in the schedule for that purpose prepared and settled by us, and annexed to and to be considered and taken as part of this our award. And we do lastly award, order, adjudge, and determine, that the said [*lessee*] shall, at his own expense, and on or before the —— day of —— next, enter into a deed of covenants with the said [*receiver*], to farm, cultivate, and manage the said lands and hereditaments accordingly. In witness whereof we have hereunto subscribed our hands and affixed our seals, on the —— day of ——, in the year 18—.

ON BREACHES OF HUSBANDRY COVENANTS.

the damages, and costs of reference to be paid by lessee to receiver, by two instalments:

lessee, during remainder of term, to farm according to course of husbandry mentioned in schedule:

and lessee, at his own expense, to enter into deed of covenants with receiver, to farm accordingly.

Testimonium.

THE SCHEDULE to which the above-written (*or* annexed) award refers.

Schedule.

OF RIGHT TO PART OF RAIN WATER ON A ROOF, AND NOT TO FIX SCALES NEAR A BEAM.

AWARD *that A. B. may divide the Roof and Gutters of the Shop of C. D. with Lead, or other Materials, forming a Partition not more than One Foot high from the Surface; and to maintain the same when made, in order that such Water only as shall fall on the Eastern Side of the Roof, may be conveyed to A. B.'s leaden Flat; and that A. B. shall afterwards only convey to the leaden Flat such Rain Water as shall fall on the Eastern Side of the Roof: that A. B. may put up and maintain a leaden or other Sink under the window of his First Floor, and over C. D.'s Roof, for conveying Water: that C. D. shall take down a large Beam or Scales in his Shop, suspended under A. B.'s House; and shall not fix any Beam or Scales (except for weighing Parcels not exceeding Twenty Pounds Weight), under A. B.'s House, or within Ten Feet of a certain Beam under it.*

Award that A. B. may divide the roof and gutters of the shop of C. D. with lead, or other materials, forming a partition not more than one foot high from the surface;

and shall maintain same when made;

in order that such water only as shall fall on eastern side of roof, may be

NOW KNOW YE, *That* I, the said [*arbitrator*], the arbitrator, having &c., do hereby award and direct, that the said [A. B.] shall be at liberty, without the let or disturbance of the said [C. D.], on the —— day of —— now next ensuing, or any time within three calendar months after that day, to divide the roof and gutters of the back shop of the said [C. D.] at the north and south ends, in the middle, or more eastward than the middle thereof, with lead, iron, or other materials, forming a partition not more than one foot high from the surface of the said gutters; and to maintain and preserve such partition when made; in order that such water only as shall from time to to time fall on the eastern side of the said roof of the said back shop, may be conveyed to the leaden flat of the said [A. B.]: *And* that the said [A. B.] do not, at any time

after such partition shall be made, by any pipe or other device, convey to the said leaden flat any other water than such rain-water as shall naturally fall on the eastern side of the said roof. And I do further award and direct, that the said [A. B.] shall be at liberty, without the let or disturbance of the said [C. D.], at any time within twelve calendar months now next ensuing, to put up, and continually thereafter maintain, a leaden or other sink, or trunk, under the window on the first floor of his said dwelling-house, and over the said roof of the said back shop of the said [C. D.], for the conveyance of water to the east side of the said roof, and so on, in any other manner, to the said leaden flat, and away therefrom by the drain or gutter by which the water now flows away from the said leaden flat. And I do further award and order, that the said [C. D.] shall and do, on or before the first day of June now next ensuing, take down and wholly remove the large beam or scales in his shop, and which is suspended from or near to a certain beam under the said dwelling-house of the said [A. B.] at the north side of the same house; and shall not, nor do, at any time after the first day of June now next ensuing, fix or suspend the said beam or scales, or any other beam or scales (except such as shall be used for the weighing of small parcels, not exceeding twenty pounds weight, in the course of his retail trade) to, upon, or from the said beam, under the said dwelling-house of the said [A. B.], or any other beam or rafter, or in any other way or manner, under the said dwelling-house of the said [A. B.], or in any part of the shop of him the said [C. D.], within ten feet of the aforesaid beam, under the house of the said [A. B.].

OF RIGHT TO PART OF RAIN WATER ON A ROOF, AND NOT TO FIX SCALES NEAR A BEAM.

conveyed to A. B.'s leaden flat; and that A. B. shall afterwards only convey to leaden flat such rain water as shall fall on eastern side of roof:

that A. B. may put up and maintain a leaden or other sink under the window of his first floor, and over C. D.'s roof, for conveying water:

that C. D. shall take down a large beam or scales in his shop, suspended under A. B.'s house; and shall not fix any beam or scales, (except for weighing parcels not exceeding twenty pounds weight), under A. B.'s house, or within ten feet of a certain beam under it.

TENANT TO MAKE A FENCE, LANDLORD A LEASE.

AWARD *that an intended Lessee, in possession, shall, on or before the Second of March,* MAKE A FENCE *across a Yard, according to a Plan drawn on the Award; and maintain the same during the intended Lease, and any Renewal: that the Landlord shall, on the Third of March,* EXECUTE A LEASE *to the intended Lessee, of the Premises in his Occupation, excepting that Part of the Yard to be taken off; such Lease to be conformable to an Engrossment, formerly tendered, excepting the Reservation of a Right of Way; the Lease to bear Date subsequent to making the Fence, whereby the Description of the Premises, as being in the Occupation of the Lessee, will be correct:* AND *that the Lessee shall execute a* COUNTERPART.

Award that intended lessee in possession shall, on or before 2d March, make a fence across a yard, according to a plan drawn on the award;

NOW KNOW YE, *That* I, the said [*arbitrator*], having, &c., do make this my award in writing, of and concerning the matters so to me referred as aforesaid, in manner following: that is to say; I do award, order, and adjudge, that the said [A. B.] shall, on or before the second day of March now next ensuing, at his own expense, erect and make a sufficient fence of paling, or wall, but not exceeding the height of six feet, from that corner of his garden which is marked with the letter *A.* on the plan drawn on this my award, across the yard, now in the occupation of the said [E. F.], to that corner of the stable, in the occupation of the said [A. B.], which is marked with the letter *C.* on the said plan, according to a line drawn in red ink on the said plan, whereby a part of the said yard will be taken off, and laid to the premises in the occupation of the said [A. B.]: *And* that the said [A. B.], his executors, administrators, or assigns, do maintain and

and maintain same during intended lease, and any renewal;

repair such fence or wall, during the term of the lease hereinafter mentioned, and any further term that may be granted in pursuance thereof. And I do further award, order, and direct, that the said [A. B.] shall and do (*a*), on the third day of March now next ensuing, seal, and deliver to the said [E. F.], a lease of the premises now in the occupation of the said [E. F.], except the said part of the said yard so to be taken off as aforesaid; which lease shall be, in all respects, conformable to the engrossment of a lease heretofore tendered to the said [A. B.] for his execution (and on the back whereof I have subscribed my name), except in the particulars following: that is to say; the exception or reservation of a right of way contained in the said engrossment, shall be wholly omitted; and the said lease shall bear date on a day subsequent to the making of the said fence or wall, instead of the 18th day of August, 18—; whereby the description of the premises, as being in the occupation of the said [E. F.], will, by reason of the erection of the said fence or wall, be correct, and will not require alteration. And I do further award, order, and direct, that the said [E. F.] shall and do duly seal and deliver to the said [A. B.], a counterpart of the lease hereinbefore directed to be made.

TENANT TO MAKE A FENCE, LANDLORD A LEASE.

that landlord shall, on 3rd March, execute a lease to intended lessee of the premises in his occupation, excepting, &c.:

and that lessee shall execute a counterpart.

[(*a*) "at his own costs and charges," (or otherwise as the case may be).

An award directing an instrument to be executed, should always state at whose expense it is to be prepared, as this is a source of much dispute.

Where an arbitrator awarded, that B., (the vendee), should perform his contract with A., (the vendor), upon A. conveying to him a good title, it was held to be necessary for A., in moving for an attachment, to shew that he had tendered a conveyance. *Standly* v. *Hemington*, 2 Marsh. 276. But it should seem that if the conveyance was to be prepared at the expense of the vendee, (according to the general rule, *vide* Sugd. Vend. 7th ed. 230, and there seems to have been nothing to take this case out of the rule), it would be incumbent on *him* to tender the conveyance.]

Whether vendor bound to tender a conveyance.

OF RENT DUE FROM LESSEE, AND DAMAGES FOR BREACH OF COVENANTS.

AWARD *that one Year's Rent was due from a Lessee: that the Lessee did not perform the Covenants of the Lease, except as to Payment of the first Year's Rent: that Lessor has thereby sustained Damage to a certain Amount: that Lessee shall pay the Sums awarded, on a certain Day.*

Award that one year's rent was due from lessee:

NOW KNOW YE, that I the said [*arbitrator*], having, &c. do make this my award, of and concerning the matters so referred to me as aforesaid, in manner following: that is to say; I do find and award, that, at the time of commencing the said action, there was and now is justly due and owing from the said [C. D.] to the said [A. B.], for the rent of the said premises, for one year from the expiration of the term granted by the said lease as aforesaid, to the said 29th day of September, 18—, as aforesaid, the sum of 634*l.* *And* I do further find and award, that the said [C. D.], during his possession of the said premises, under and by virtue of the said indenture of lease, and the assignment thereof, as aforesaid, did not perform, fulfil, or keep the covenants in the said indenture contained, and hereinbefore mentioned, as aforesaid, except as to the payment of the first rent of 37*l.* a year thereby reserved; but broke the same, contrary to the true intent and meaning of the said lease, and the said covenants. *And* I do further find and award, that the said [A. B.] hath sustained damage, by reason of the non-performance of the said covenants by the said [C. D.], to the amount of 366*l.*: *And* as to the said sum of 366*l.*, and the said sum of 634*l.*, so by me also awarded, as aforesaid, (making together the sum of 1,000*l.*) I do award that the said [C. D.] shall and do, on &c., at &c., pay, or cause to be paid, the said sum of 1,000*l.* unto the said [A. B.], or to such person or persons as she may lawful-

that lessee did not perform covenants of lease,

except as to payment of first year's rent:

that lessor has thereby sustained damage to a certain amount:
that lessee shall pay the sums awarded, on, &c.

ly authorize to receive the same. *(Add award as to costs; and that A. B. shall execute a general release to C. D.)*

OF RENT DUE FROM LESSEE, AND DAMAGES FOR BREACH OF COVENANTS.

[35]

AWARD (*a*) *by one Arbitrator, under Cross Deeds Poll of Submission, by Landlord and Tenant, where the Time for making the Award had been enlarged by the Arbitrator under a Power in the Submission, That the Tenant was liable to* REBUILD *a Dwelling House and Premises destroyed by* FIRE.

TENANT TO REBUILD HOUSE DESTROYED BY FIRE.

TO ALL TO WHOM THESE PRESENTS SHALL COME. I, [*arbitrator*], of the Inner Temple, Barrister at Law, *Exordium.*

(*a*) It may be of use here to add something on the progress of the law, as to the accidental burning of houses, and on the liabilities of particular tenants, as connected with the doctrine of waste. At the common law, lessees were not answerable to landlords for accidental or negligent burning; for, as to fires by accident, it is expressed in Fleta, that *fortuna ignis vel hujusmodi eventûs inopinati omnes tenentes excusant;* Fleta, lib. 1, cap. 12, s. 20, p. 15, edit. 1735; and Lady *Shrewsbury's* case, 5 Co. 13, is a direct authority that lessees for life or years were equally excusable for fires by *negligence.*

At common law, lessees were not answerable for accidental fires.

Then came the statute of Gloucester, 6 Edw. I. c. 5; by which "it is provided, that a man henceforth shall have a writ of waste in the Chancery against him who holds by the curtesy of England, or otherwise for term of life, or for term of years, or a woman in dower. And he that shall be attainted of waste, shall forfeit the thing which he has wasted; and moreover shall recompence thrice so much as the waste shall be taxed at." 2 Inst. 299.

The statute of Gloucester gave a remedy against tenants for life or years.

By this statute, the lessor may now have an action of waste, or upon the case in the nature of waste, against the lessee, if he permits the house to be out of repair, unless it was ruinous at the time of the lease. Co. Litt. 54 b. Wms. n. 1 Saund. 323, *a* (7). For the statute extends to *permissive,* as well as *voluntary* waste. 2 Inst. 145. Co. Litt. 53 a. 2 Roll. Abr. 816. However, a tenant at will is not punishable for *permissive* waste. Litt. s. 71. Co. Litt. 57 a. Thus, in the Countess of *Shrewsbury's*

But a tenant at will is not punishable for permissive waste;

TENANT TO REBUILD HOUSE DESTROYED BY FIRE.

Recital of cross deeds poll of landlord and tenant, reciting that buildings were destroyed by fire;

send greeting. WHEREAS, on or about the eleventh day of December now last past, a certain deed poll was made and executed by [A. B.], of &c.; and a certain other deed poll was on the same day made and executed by [C. D.], of &c., in which said two several deeds poll, *after reciting* that a certain messuage or dwelling-house, and certain other buildings, situate and being No. —, Lower Shadwell, in the parish of St. Paul, Shadwell, in

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case, 5 Co. 13, she brought an action on the case against her tenant at will for so negligently keeping his fire, that the house was burnt; and the whole Court held, that neither an action on the case, nor any other action, lay; because at common law, and before the statute of Gloucester, an action did not lie for waste against a lessee for life or years, having an interest in the land by the act of the lessor; and that it was the lessor's folly to make such a lease, and not restrain him by covenant, condition, or otherwise, that he should not do waste. So, and for the same reason, it was held, that a tenant at will should not be punished for permissive waste, he not being within the statute. The Countess of *Shrewsbury* v. *Crompton*, Cro. Eliz. 777, 784, *S. C. Panton* v. *Isham*, 3 Lev. 359. 1 Vin. Abr. 217, (B. 3). But this means a tenant at will in the strict sense of the word, and not tenant from year to year, for he is within the statute. Bro. Abr. *Waste*, pl. 52. 2 Roll. Abr. 828, pl. 11. 22 Vin. Abr. 469. 2 Inst. 302. Co. Litt. 54 b. [A tenant from year to year is not liable to general repairs: he is bound to use the premises in a husbandlike manner, but no farther. *Horsefall* v. *Mather*, Holt's Nisi Prius Cases, 7. For the mere relation of landlord and tenant is a sufficient consideration for the tenant's promise to manage a farm in a husbandlike manner. *Powley* v. *Walker*, 5 Durnf. & East, 373.

though a tenant from year to year is within the statute.

Yearly tenant is not liable to general repairs;

he is answerable for commissive, but not for permissive waste.

[Although an action on the case may be maintained against a tenant for commissive or wilful waste, no action can be maintained for permissive waste only. *Gibson* v. *Wells*, 1 Bos. & Pull. 291. In this case, Sir James Mansfield, C. J., says, " there is no doubt but an action on the case may be maintained for wilful waste; but at common law, if any part of the premises are suffered to be dilapidated, it amounts to permissive waste; and if this action be maintainable, such an action might be brought against a tenant at will, who omitted to repair a broken window. I think this action is an innovation, and I am not disposed to encourage it."] And the Courts of law have of late years leaned as much as possible against construing demises, where no certain term is mentioned, to be estates at will, but have rather held them to be tenancies from year to year, so long as both parties please; especially where an annual rent is reserved. 2 Bla. Com. 147. In *Timmins* v. *Row-*

Where no certain term is mentioned, the Courts imply a tenancy from year to year.

the county of Middlesex, were on or about the twenty-first day of ——, 18—, burnt down and destroyed by fire; *and* that at the time the same were so burnt down and destroyed by fire, the same were in the occupation of the said [A. B.], who claimed to hold the same as tenant of the said [C. D.]; *and* that by a memorandum or agreement made and entered into on the —— day of ——, 18—, between the said [A. B.], of the one part, and the

TENANT TO REBUILD HOUSE DESTROYED BY FIRE.

that at the time of the fire they were in the occupation of tenant; that by an agreement between the

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linson, 3 Burr. 1609, Mr. Justice *Wilmot* said, that "in the country, leases at will, in the *strict* legal notion of a lease at will, being found extremely inconvenient, exist only *notionally*, and were succeeded by another species of contract, which was less inconvenient." But this observation means, not that estates at will may not arise now as well as formerly, but only that it is no longer usual to create such estates by *express* words, and that the judges incline strongly against *implying* them. Harg. n. Co. Litt. 55 a (3).

After the statute of Gloucester, an action of waste might have been brought against tenant for life, or years, for accidental fire.

Therefore, after the statute of Gloucester, an action of waste might be brought against tenant for life, or years, or even half a year, if his house was accidentally burnt by fire, this being a species of negligent or permissive waste. For, notwithstanding the statute speaks of one who holds for a term of years, in the plural number, yet, it appears by the authority of Littleton, sect. 67, that although it be a penal law, whereby treble damages, and the place wasted shall be recovered, yet a tenant for half a year, being within the same mischief, shall be within the same remedy, though it be out of the letter of the law: for *qui hæret in literâ, hæret in cortice;* which is an excellent example, whereupon, in many similar cases, a man may form a certain opinion. Co. Litt. 54 b. 2 Inst. 302.

But now, by the 6th Anne, no action can be maintained against any person whose house is accidentally burnt;

but not to annul any agreement between landlord and tenant.

But now, by the 6 Anne, c. 31, as to waste by buildings being destroyed by *fire*, the ancient law is restored, and the distinction introduced by the statute of Gloucester between tenants at will and other lessees, is taken away. For the statute of Anne, s. 6, enacts, "that no action, suit, or process whatsoever, shall be had, maintained, or prosecuted, against *any person* in whose house or chamber any fire shall *accidentally* begin, or any recompence be made by such person for any damage suffered or occasioned thereby, any law, usage, or custom to the contrary notwithstanding: however, by sect. 7, it is "provided, that nothing in this act contained shall extend to defeat or make void any contract or agreement made between landlord and tenant." By sect. 8, so much of this act as related to the indemnity of any person in whose house or chamber any fire should accidentally begin, was temporary; but by 10 Anne, c. 14, s. 1, the 6th section of 6 Anne, c. 31, was made perpetual. Although the 7th section is not mentioned in the 10th Anne, yet

landlord and tenant, it was agreed that the question of law, which of them was liable to rebuild, should be referred to arbitrator;

said [C. D.], of the other part, it was (amongst other things) agreed, that the question of law, whether the said [A. B.] or the said [C. D.] was liable to rebuild the premises, should be referred to me, the said [*arbitrator*], whose award was to be final; *and* that it was understood and agreed, that the same question might be narrowed to the question, whether the said [A. B.] was liable to the said [C. D.], to rebuild the said messuage or dwelling-

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it seems that it was impliedly thereby also made perpetual, if it was necessary. But that question does not appear to be important; for *modus et conventio vincunt legem*. *Berryman* v. *Bowden*, Het. 59. *Cowper* v. *Andrews*, Hob. 40. *Lanyon* v. *Carne*, 2 Saund. 167. Co. Litt. 19 a. 166 a. 180 a.

Tenants at will, for life, or years, may subject themselves to an action of waste, under an express agreement.

Therefore, the doctrine that no action lies, should be understood with some limitation; for if tenant at will stipulates with his lessor to be responsible for fire by negligence, or for other permissive waste, without doubt an action will lie on such *express* agreement. The same observation holds with respect to tenants for life, or years, before the statute of Gloucester; for though the *law* did not make them liable to any action for waste, yet it did not restrain them from making themselves liable by *agreement*. Hargr. n. Co. Litt. 57 a (1). Therefore, where the covenant is to repair generally, it is of no use to attempt a defence on the ground that the house was burnt by accident; because the established principles of law on the subject are clear, that the lessee would have been bound to rebuild the house, notwithstanding the accident: the distinction being between a duty created by *law*, and one created by the *party*. Wms. n. 2 Saund. 422, (2), *Walton* v. *Waterhouse*. For, when the law creates a duty, and the party is disabled to perform it, without any default in him, *and he has no remedy over*, the law will excuse him; as, in waste, if a house be destroyed by tempest, or by enemies, the lessee is excused; so, in escape, if a prison be destroyed by tempest or enemies, the gaoler is excused. 33 H. 6, 1. But when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he can, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore, if a lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he is bound to repair it within a reasonable time. Bro. Abr. *Covenant*, pl. 4. *Paradine* v. *Jane*, Al. 27; *S. C.* Sty. 47. 18 Vin. Abr. 515, pl. 10. Year-book, 40 Edw. 3, 6, a. *Poole* v. *Archer*, 2 Show. 401; Skin. 210, *S. C. Compton* v. *Allen*, Sty. 162. *Pym* v. *Blackburn*, 3 Ves. 34. What shall be reasonable time, the justices are to determine. Com. Dig. *Temps.* (D). So where, by deed indented, a lease for years was made of a meadow, by

Where a tenant for life, or years, covenants to repair *generally*, he is liable to rebuild if the house be burnt by accident.

house, and other buildings: *It was*, in and by the respective deeds poll *witnessed*, that in pursuance of the said recited agreement, each of them the said [C. D.] and [A. B.], did for himself, his heirs, executors, administrators, and assigns, as to and concerning his and their respective acts, deeds, and defaults only, promise, declare, and agree, to and with the other of them, the said [C. D.] and [A. B.], his executors, administrators, and assigns, mutually and

that it was agreed, it might be narrowed to the question, whether the tenant was liable to rebuild; it was by the deeds poll *witnessed*, that the question, whether

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which the river Exe runs; and the lessee covenanted to *sustain* and repair the banks, to prevent the water from overflowing, upon pain of forfeiture of ten pounds: and afterwards, by reason of a great, outrageous, and sudden flood, caused by the subversion of the weirs in Devonshire, the banks were decayed and perished; it was held, that the lessee was excused from the penalty; as if it were of an house which was burnt by lightning, or overturned by the wind, because it is the act of God, which cannot be resisted; but that still he was bound to make and repair the thing in convenient time, because of his own covenant. Dyer, 33 a, (10). Moore, 62, pl. 173. *Griffith's* case, Moore, 69. So where, in covenant for not keeping a bridge in repair, the defendant pleaded, that the bridge was, by the act of God, by a great and extraordinary flood of water, such as the bridge could not resist, without the default of the defendant, washed, broken, and fell down; this plea was on demurrer adjudged to be insufficient. The Company of *Brecknock Navigation* v. *Pritchard*, 6 Durnf. & East, 750. So where, in covenant against tenant for life under a marriage settlement, who had covenanted to repair the house during his life, and so leave the same at his death, the defendant pleaded that three-fourth parts of the house was burned down, and that he repaired it until it was burnt, and had repaired the residue that was not burnt. On demurrer to this plea, the Court was of opinion, that it contained no answer whatever to the declaration; for the defendant having covenanted to repair without any exception, it imported, that he should at all events repair the house; and, in case it were burnt, or fell down, should rebuild it. Earl of *Chesterfield* v. Duke of *Bolton*, Com. Rep. 627. And as to a lessee for years, the same point precisely was determined in the case of *Bullock* v. *Dommitt*, 6 Durnf. & East, 650, on the authority of the last-mentioned case; and therefore, the doubt mentioned by the learned *Hargrave*, Co. Litt. 57 a, (1), *ad finem*, whether, on the statute of Anne, a covenant to repair *generally* extends to the case of *fire*, and so becomes an agreement within the statute, is now removed. [*Vide post*, Vol. 4, p. 421].

Where a lease, containing a covenant by the lessee to keep the premises in repair, had expired, and he then verbally agreed to hold over, paying an additional rent, nothing more being expressed between the parties respecting the terms of the new tenancy, the premises were consumed by

If, after the expiration of a term, the lessee continue to hold, though

TENANT TO REBUILD HOUSE DESTROYED BY FIRE.

the tenant is liable to rebuild, and all actions, &c. should be referred to arbitrator:

reciprocally, that the before-mentioned question, whether the said [A. B.] is liable to the said [C. D.], to rebuild the said premises; and all actions, suits, causes of action and suit, controversies, disputes, doubts, and questions whatsoever, between the said parties, concerning the re-building the said messuage, buildings, ground and premises, should be, and the same were by the said respective deeds poll referred and submitted to the award, judgment, and

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at an advanced rent, the parties are presumed to have acceded to the terms of the former tenancy, as far as they are applicable to their new situation.

fire. An action of *assumpsit* was brought, and the plaintiff declared, that in consideration that defendant had become plaintiff's tenant of a warehouse, &c. the defendant undertook to repair; and averring, that defendant had continued his tenant, assigned as a breach that he had suffered the premises to remain out of repair. On the trial before Lord *Ellenborough*, it was insisted for the defendant, that a new holding had been created, without reference to the former lease. But his Lordship was of opinion, that, where a tenant holds over, he impliedly holds over subject to all the covenants in the lease, which are applicable to his new situation; and that the mere advance of rent made no difference. *Digby* v *Atkinson*, 4 Camp. 275 †. And where there is, besides a covenant to repair, a covenant by the lessee to insure the premises from fire for a certain sum, and the premises are burnt, the lessee's liability to rebuild is not limited to the amount of the sum for which he covenanted to insure. *Ibid.*

A covenant that the tenant shall insure in a certain sum, does not limit his responsibility to that sum, under a general covenant to repair.

On account of the lessee's liability to rebuild, on a general covenant to repair, accidents by fire and tempest are sometimes excepted:

But even then, if the lessee covenant to pay the rent, he will be liable to pay it, notwithstanding the ruinous condition of the premises, and although the lessor being liable to repair them should have neglected to rebuild.

It was this liability of the tenant to rebuild, notwithstanding the house should be burned down by accident, or blown down by tempest, that in all probability occasioned an exception, now frequently introduced in leases, of casualties by fire, and sometimes by wind and tempest, [which exception, it is essential should be stated in declaring on the covenant to repair. *Brown* v. *Knill*, 5 J. B. Moore, 164.] But even then, the lessee is bound to pay the rent during the term, although the house should be burnt or blown down, if there be an express covenant for payment of the rent, for the same reason and upon the same principles that he is bound to repair; namely, because he has bound himself by an express covenant to pay the rent. And as it appears by the before-mentioned case of *Paradine* v. *Jane*, Al. 26, that it is no plea in such case to an action of covenant for non-payment of the rent, to say that the house was destroyed by the king's enemies, or that the defendant was evicted and turned out of possession by them; so it is equally no answer to say, that the house was burnt or blown down, and that therefore he is not bound to pay the rent. Thus, in covenant for non-payment of rent reserved by a lease, in which the lessee covenanted to pay the rent, and also to repair, except the premises should be demolished or damaged by fire, the defendant pleaded, that, before the rent

† As to this, *vide post*, Vol. 4, p. 404.

final determination and decision of me, the said [*arbitrator*]: *And* that the said parties respectively, and their respective executors, administrators, and assigns, and all persons claiming under them respectively, should and would well and truly in all things obey, perform, and abide by, fulfil, and keep, the award, order, judgment, and final determination of me, the said [*arbitrator*], touching or concerning the premises; *provided* I the said [*arbitrator*,]

TENANT TO REBUILD HOUSE DESTROYED BY FIRE.

and that the parties would abide his award:

provided it were made on

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became due, the premises were burnt down against his will, and that they were not rebuilt by the plaintiff during the whole time for which the rent was demanded, nor had he any enjoyment of the premises; but, on demurrer, the plea was held ill, on the authority of the last cited case in Aleyn, 27; for that whatever might be the default of the plaintiff in not repairing, yet the defendant must, in all events, perform his covenant to pay the rent. *Monk* v. *Cooper*, 2 Ld. Raym. 1477; 2 Str. 763, *S. C.* And expressly the same point was afterwards determined, on the authority of the last cited case, in *Belfour* v. *Weston*, 1 Durnf. & East, 310, *S. C.* cited, *ibid.* 710. Therefore it appears, that though the premises be consumed by fire, the lessee will be liable, under an express covenant to pay rent for them, notwithstanding their ruinous condition; although the lessor, being liable to repair them, should have neglected to rebuild. *Monk* v. *Cooper*; *Pindar* v. *Ainsley*; *Belfour* v. *Weston*, ubi supra. *Hare* v. *Groves*, Anst. 687. And where the premises have been consumed by fire, and the landlord, having insured them, has recovered the insurance money, the tenant cannot compel him to rebuild; for the houses being insured by the landlord is nothing to the tenant. *Pindar* v. *Ainsley*, cited, 1 Durnf. & East, 312. And it seems that the lessor is not bound to rebuild, though he may insist on the payment of the rent during the whole term. *Pindar* v. *Ainsley*, cited 1 Durnf. & East, 312. *Weigall* v. *Waters*, 6 Durnf. & East, 488. In the case of *Monk* v. *Cooper*, it does not appear that there was any express covenant by the landlord to rebuild in case of fire, though it seems to have been taken for granted that he was bound to do so, because the lessee's covenant to repair contained an exception against fire. But in *Weigall* v. *Waters*, 6 Durnf. & East, 488, where in the lessee's covenant to repair, an exception was inserted against fire and tempest, and there was no express covenant for the landlord to repair in either of these cases, Lord *Kenyon* doubted whether the lessor was liable; and that he would not be liable, appears to have been expressly decided in the Court of Chancery. *Steele* v. *Wright*, before Lord *Apsley*, cited 1 Durnf. & East, 708. On another occasion, where the doctrine of the lessee's liability, notwithstanding the destruction of the house, was alluded to, Lord *Kenyon* observed, "that it must be taken with some qualification; for

The lessor is not bound to rebuild, though he may insist on payment of the rent.

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or before a given day, or within an enlarged time, not exceeding two months.

should make my award in writing, under my hand, ready to be delivered to the said parties, their respective executors or administrators, or such of them as should request the same, on or before the 23d day of January then next ensuing, or within such enlarged period of time, not exceeding two months, as I the said [*arbitrator*] should think proper to fix, by any writing under my hand; *as* by the said deeds poll, reference being thereto respectively had, will (amongst

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where an action was brought for rent after the house was burnt down, and the tenant applied to the Court of Chancery for an injunction, Lord *Northington* said, that if the tenant would give up his lease, he should not be bound to pay the rent." *Cutter* v *Powell*, 6 Durnf. & East, 323. [If the house be burnt down, and the lessor, having insured and received the insurance money, neglects to rebuild, yet, it seems the rent continues payable.]

In more than one case in Chancery, where the lessee has covenanted to repair, accidents by fire excepted, and the house having been burnt, the lessor, being insured, and *having received the insurance money*, has neglected to rebuild, an injunction has been granted against an action at law by the lessor for the rent, till the house should be rebuilt. *Camden* v. *Morton*, 2 Eden, 219; Selw. N. P. 436, 4th ed. *S. C. Brown* v. *Quilter*, 2 Eden, 219; Ambl. 619, *S. C.* *Steele* v. *Wakeford*, 1 Durn. & East, 708. But these cases have been overruled by *Hare* v. *Groves*, Anstr. 687, and *Holtzapffel* v. *Baker*, 18 Ves. 115. Comyn on Landlord and Tenant, 193. The point in which the former determinations differ from these subsequent decisions, is the circumstance that in all of them the landlord had insured, and received the insurance money; and therefore had the value of the thing, which was the subject of the contract with the lessee. As to him, therefore, no loss had happened. Accordingly, the Lord Chief Baron, in *Hare* v. *Groves*, suggested, that there "might be some equity to say, that he should not keep the house, or its value, and receive the rent also, but should either put the value down again, for the use of the lessee, or remit the rent." It is difficult, however, to conceive, as was observed in the last of these cases, (18 Ves. 118), how that distinct contract, merely for the advantage of the lessor, with which the lessee has no concern, can affect the right as between them. 2 Eden, 220. For, as the lessee could not compel the lessor to make the insurance, it seems necessarily to follow, that he cannot demand any benefit from it.

It is sometimes stipulated that the rent shall be suspended, or abated, in case

As the lessee becomes liable under an express covenant to pay the rent, notwithstanding the premises are rendered useless by fire; and as the exception of fire and accident in the tenant's covenant to repair, will not bind the lessor to repair, it is sometimes stipulated that the rent shall

other things) more fully appear. AND WHEREAS I the said [*arbitrator*], being unable to make my award on or before the said 23d day of January now last past, did, on the said 22d day of January now last past, duly enlarge the time for making my award in pursuance of the terms of the said respective deeds poll, until the 14th day of March then next, inclusive (*b*). NOW KNOW YE, that I the said [*arbitrator*], having taken upon myself the burthen of the

TENANT TO REBUILD HOUSE DESTROYED BY FIRE.

Recital of arbitrator having enlarged the time for making his award.

Testatum.

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be suspended or abated, in case of fire or tempest, and that the lessor shall, in such event, rebuild the premises. See the Form, in an agreement for a lease, *ante*, Vol. 1, p. 12, 13. [See further as to the rights and liabilities of landlords and tenants in regard to the destruction of the demised property by fire, *post*, Vol. 4, pp. 421, 426, 490.]

of fire, and that the landlord shall rebuild.

Lord *Coke* treats it as clear, that tenants by the curtesy, as well as tenants in dower, were punishable for waste at common law. 2 Inst. 299, 300. See also to the same effect Doct. and Student, 102, 113. Noy's Tenures, 11, 40. However, in 2 Inst. 145, Lord *Coke* says, the writ of waste against tenant by the curtesy is by statute. See 2 Inst. 301. But the preponderance of authority seems against the latter proposition. See 7 Gwill. Bac. Abr. 264, *Waste* (H). If then tenant by the curtesy, and tenant in dower, were, by the common law, responsible for accidental fire, it may sometime or other become necessary to determine whether they are within the statute of Queen Anne. The statute in expression is very *general*, the words being, that no action shall be prosecuted against *any person* in whose house any fire shall *accidentally* begin; and it seems calculated to take away all actions in cases of accidental fire, as well from *other* persons, as from *landlords*. Hargr. n. Co. Litt. 57 a, (1); and see Earl of *Chesterfield* v. Duke of *Bolton*, Com. Rep. 629.

Tenants by the curtesy and dower, seem not to be answerable for accidental fires.

The distinction which is taken as to waste at common law, between tenants coming in by *act of law*, and tenants whose estates accrue by *act or agreement of parties*, will not universally hold; for tenants by statute merchant and statute staple, though they come in by *process of law*, are not punishable for waste. 6 Co. 37 b. Mr. Hargrave says, "perhaps the reason of this may be, that it is in the power of debtors to prevent the commencement of these estates, or to determine them, by paying the debts for which creditors have such estates; and also that the tenants of such estates are accountable for all profits they make beyond the amount of the

Tenants by statute merchant or staple, are not punishable for waste.

(*b*) "Until" is, of itself, for this purpose inclusive. *Vide ante*, Vol. 2, p. 632, n. (*c*).

"Until."

TENANT TO REBUILD HOUSE DESTROYED BY FIRE.

said reference, and having examined and duly considered the allegations and proofs of the said parties respectively, *do* make and publish this my award in writing, of and concerning the matters to me referred, as follows: that is to say; I do award and adjudge, that the said [A. B.] was and is liable (*c*) to the said [C. D] to re-build the said messuage, or dwelling-house, and other buildings, at the expense and costs of him the said [A. B.]. IN WITNESS, &c.

Award that tenant is liable to rebuild.

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debts due to them." Hargr. n. Co. Litt. 57 a, (1), *ad finem*. But the reason appears to be, that, because they are not tenants for life or years, they are therefore out of the statute of Gloucester. 6 Co. 37 b. 2 Inst. 302.

(*c*) As to the submission of a question of law to an arbitrator, *vide post*, 17th AWARD, note (*b*).

[45]

RIGHT OF PRESENTATION.

AWARD *of the Right of* PRESENTATION *to an* ADVOWSON (*a*).

THAT the advowson, and right of presentation of, in, and to the said vicarage of [H.], are vested in, and belong to the sub-dean of [A.], and his successors, and the said [F. A.], and her heirs: AND that the said sub-dean, and his successors, and the said [F. A.], and her heirs, are entitled to present to the said vicarage by turns: AND that the said dean and chapter of the cathedral church of [A.], have not any right or title to the advowson of the said vicarage, or of any part thereof, nor any right or title to present thereto.

That an advowson is vested in two:

that they are entitled to present by turns:

and that a dean and chapter have no right thereto.

(*a*) Where an arbitrator, to whom the question of the right of two rectors to the tithe of certain lands was referred, had power to devise all means to prevent future litigation between the parties, and to settle all matters in difference between them, and to determine what he should think fit to be done by either of the parties, touching the matters in dispute, it was held that he did not exceed his power, by awarding undivided moieties of the tithes to the two rectors. *Prosser* v. *Goringe*, 3 Taunt. 426.

An arbitrator may award undivided moieties of tithes to two rectors.

BY TWO ARBITRATORS, OF RECONVEYANCE AND GENERAL RELEASE TO MORTGAGOR.

AWARD *of two Arbitrators, under Cross* BONDS *of Submission, on a general Reference by a Mortgagor and Mortgagee, that the Mortgagor shall pay to the Mortgagee a certain Sum in full of all Demands on Mortgages and other Securities, and of all Costs to the Day of Submission: on Payment of the Money awarded, the Estates mortgaged to be reconveyed; and the Deeds relating thereto to be delivered to the Mortgagor: the Mortgagor to be let into Possession of the mortgaged Estates on the Day of Payment, and to receive the Arrears of Rent: the Mortgagor to pay the Costs of Actions and Suits between him and the Mortgagee previous to the Submission: and on Payment of the Sum awarded, the Mortgagee to give the Mortgagor a* GENERAL RELEASE.

Exordium.

TO ALL TO WHOM THIS PRESENT WRITING OF AWARD SHALL COME, [*two arbitrators*], of, &c. *send greeting.*

Recital of cross bonds of submission by mortgagor and mortgagee.

WHEREAS [*mortgagor*], of &c., gentleman, and [*mortgagee*], of &c., widow, have respectively bound themselves each to the other, in the penal sum of (one thousand) pounds, by their several bonds or obligations, bearing date on or about the (twenty-first) day of (March) now last past; *With* conditions thereunder written, to obey, perform, fulfil, keep, and abide by, the award, order, arbitrament, final end, and determination of the said [*two arbitrators*], arbitrators indifferently named, elected, and chosen, as well on the part and behalf of the said [*mortgagor*] as of the said [*mortgagee*], to arbitrate, award, and determine of and concerning all and all manner of titles, mortgages, securities, action and actions, cause and causes of action, suits, bills, bonds, specialties, judgments, exe-

BY TWO ARBITRATORS, OF RECONVEYANCE AND GENERAL RELEASE TO MORTGAGOR.

cutions, extents, quarrels, controversies, trespasses, damages, and demands whatsoever, at any time theretofore had, made, moved, brought, commenced, sued, prosecuted, suffered, continued, or depending by and between the said parties, or either of them; *So as* the said award should be made in writing, under the respective hands and seals of us the said arbitrators, and ready to be delivered (*a*) to the parties in difference, or such of them as should desire the same, on or before the twenty-ninth day of the present month of September: [*As* by the said recited bonds or obligations, and the conditions thereof, reference being thereunto had, will more fully and at large appear.]

Testatum.

NOW KNOW YE, that we the said [*arbitrators*], having taken upon ourselves the charge and burthen of the said award, and having heard the said parties and their attornies, and having heard and examined their respective witnesses, and duly weighed and considered all their allegations, and the grievances on both sides; and having taken all the matters in difference submitted to our award as aforesaid, *Do* order and award, *That* the said [*mortgagor*], his heirs, executors, or administrators, shall pay, or cause to be paid unto the said [*mortgagee*], her executors, administrators, or assigns, the sum of one hundred pounds, on the (third) day of (December) now next, at the office of [*attorney*], solicitor, at ——, in the said county of ——, between the hours of ten and twelve in the forenoon of the same day, in full of all her demands (down to the said twenty-first day of March now last past, being the day of the date of the said recited bonds or obligations); not only on account of all principal money and interest due to her, for or in respect of any mortgages, bonds, notes, or other securities whatsoever, at any time theretofore made, given, or otherwise executed by or between the said [*mortgagor*] and [*mortgagee*], or either of them, of or concerning any leasehold messuages, cottages, dwelling-houses, tenements, closes, and hereditaments, situate, standing, lying, and being in —— aforesaid, or elsewhere in the said county of ——; and which are mentioned and comprised in a certain indenture of lease or demise, bearing date on or

Award, that mortgagor shall pay mortgagee a sum in full of all demands on mortgages, and other securities, and of all costs to the day of submission:

(*a*) *Vide ante*, Vol. 2, p. 583, n. (*b*); *ante*, p. 2, n. (*b*).

about the —— day of ——, 18—, and made and executed by [*lessor*], of &c., unto the said [*mortgagor*]; but also in satisfaction and discharge of and for all costs, charges, and expenses whatsoever that have accrued or happened to or unto her the said [*mortgagee*], touching or concerning any such mortgages, securities, suit or suits, action or actions, or other cause, matter, or thing whatsoever, at any time before the said twenty-first day of May now last past, depending between the said [*mortgagor*] and [*mortgagee*]. And we do hereby further award, order, and declare, that, on payment of the said sum of one hundred pounds by the said [*mortgagor*] to the said [*mortgagee*], her executors, administrators, or assigns, on the day, and at the time and place aforesaid, she the said [*mortgagee*] shall and do, at the expense of the said [*mortgagor*], his heirs, executors, administrators, or assigns, not only seal and deliver unto the said [*mortgagor*], his heirs, executors, or administrators, a good and effectual deed of assignment, of *All those* two messuages, &c., situate, lying, and being in —— aforesaid; *and also* of all those several closes of land, &c.; or to any person or persons he or they may appoint, for and during all the rest, residue, and remainder of the term and terms of years, and other her estate and interest therein and thereunto; *but also* shall and do, on the day and at the time and place aforesaid, deliver, or cause to be delivered unto the said [*mortgagor*], his heirs, executors, administrators, or assigns, all deeds, evidences, and writings whatsoever in her custody, power, or possession, or in the custody, power, or possession of any other person or persons whomsoever, and which she can obtain or come at without suit at law or in equity, which relate to or concern the said leasehold messuages, closes of land, and premises, or any part or parcel thereof. And the said [*arbitrators*] do hereby further order and award, *That* the said [*mortgagor*], his heirs, executors, administrators, or assigns, shall be let into the quiet and peaceable possession (*b*) of *All* and singular the said leasehold premises so hereby awarded to be assigned by the said [*mortgagee*] to the said

BY TWO ARBITRATORS, OF RECONVEYANCE AND GENERAL RELEASE TO MORTGAGOR.

on payment of money awarded, the estates mortgaged to be reconveyed;

and the deeds relating thereto to be delivered to mortgagor:

mortgagor to be let into possession of the mortgaged estates on the day of payment;

(*b*) *Vide ante*, Vol. 2, p. 639.

BY TWO ARBITRATORS, OF RECONVEYANCE AND GRNERAL RELEASE TO MORTGAGOR.

[*mortgagor*], his heirs, executors, administrators, or assigns, as aforesaid, on the said (third) day of (December) now next: *And* that he the said [*mortgagor*], his heirs, executors, administrators, or assigns, shall be entitled unto, and have, receive, and take all arrears of rent of the said premises so intended to be assigned by the said [*mortgagee*], her executors or administrators, unto the said [*mortgagor*], his heirs, executors, administrators, or assigns as aforesaid, as now is, and shall be on the said (third) day of (December) next, in the hands of the present tenants thereof. AND we the said [*arbitrators*] do hereby also order and award, *That* the said [*mortgagor*], his heirs, executors, or administrators, shall and do pay, or cause to be paid, all such costs, charges, and expenses, as at any time before the said (twenty-first) day of (March) now last past, have happened, or been occasioned by or by reason or means, or upon account of any suit or suits, action or actions, either at law or in equity, depending by or between them the said [*mortgagor*] and [*mortgagee*]. AND we the said [*arbitrators*] do hereby further order and award, *That* she the said [*mortgagee*] shall, upon receiving the said sum of (one hundred) pounds, execute unto the said [*mortgagor*], his heirs, executors, and administrators, a good and sufficient release of all and all manner of action and actions, cause and causes of action, bills, bonds, writings and obligations, notes, acknowledgments, powers, provisoes, dues, duties, reckonings, accounts, sum and sums of money, judgments, executions, extents, quarrels, controversies, trespasses, damages, and demands whatsoever, for or by reason or means of any matter, cause, or thing whatsoever, both at law or in equity, or otherwise howsoever, which against the said [*mortgagor*] she the said [*mortgagee*] ever had, or now hath, or which she the said [*mortgagee*], her heirs, executors, or administrators, shall or may have, claim, challenge, or demand, for or by reason or means of any act, cause, or thing whatsoever, from the beginning of the world to the said (twenty-first) day of (March) now last past, being the day of the date of the said bonds of arbitration. IN WITNESS whereof, we the said [*arbitrators*], the said arbitrators, * have here-

and to receive arrears of rent.

Mortgagor to pay costs of actions and suits between him and mortgagee previous to submission:

and on payment of sum awarded, mortgagee to give mortgagor a general release.

Testimonium.

unto severally set our hands and seals, the —— day of ——, 18—.

SIGNED, SEALED, AND PUBLISHED, by the said [*arbitrators*], as their award, (being first duly stamped (*d*), in the presence of us, } Attestation.

(*d*) *Vide ante*, p. 4, n. (*d*). Stamp.

AWARD *of an* UMPIRE *appointed by two Arbitrators, on a Reference under* CROSS BONDS, *given by a* MORTGAGOR AND *a* MORTGAGEE *in Possession, concerning the Rents, Profits, and Expenses of the Lands mortgaged, and various other matters of Account, being also* A GENERAL REFERENCE, *That Proceedings in a Chancery Suit shall cease: that after giving Credit for Crops, certain Sums are due to the Mortgagee, on account of the Mortgage and mortgaged Estate: that further Monies are due to the Mortgagee, on a general Account; exclusively of* 127*l.*, *the value of several Articles for which the Mortgagor has been given Credit, and of* 107*l.*, *the value of a Quantity of Dung, for which the Mortgagee has not been given Credit, the Mortgagee to spread the Dung; and if the Mortgagor should, on a certain Day, pay the Mortgagee such Money as on a fair account shall appear to be due, and the* 127*l.* *and* 107*l.*, *and Interest on the* 107*l.*; *or should, jointly with two responsible Persons, give a Bond to the Mortgagee for Payment of the* 127*l.* *and* 107*l.*, *with Interest* **on the* 107*l.*; *and should also, jointly with the* [*51]

OF UMPIRE, ON GENERAL REFERENCE BY MORTGAGOR AND MORTGAGEE IN POSSESSION.

OF UMPIRE, ON GENERAL REFERENCE BY MORTGAGOR AND MORTGAGEE IN POSSESSION.

two responsible Persons, execute a Warrant of Attorney, to confess judgment for the Penalty of the Bond, with a Defeazance to be void on Payment of the 127*l.* *and* 107*l.*, *and Interest on the* 107*l.* *from the date thereof, then the Mortgagee to deliver to the Mortgagor Possession of the Farm, &c.: one Side of the Account between the Mortgagor and Mortgagee to contain certain Particulars, and the other Side to contain other Particulars; but the Mortgagor not to be charged with certain Expenses, nor have credit for the Produce, but to be allowed a Rent: the two Sureties to be approved by the Arbitrators or Umpire: the Mortgagor to give the Mortgagee Notice of his Intention to redeem, with the Names of the intended Sureties, if he should propose to give Security, instead of paying the Money: if the Mortgagor should not so redeem, he to be for ever foreclosed; and the Mortgagee to become absolute Owner of the Farm, and the several Articles; and, in such case, the Mortgagee to take the Farm in full for Mortgage Money, and Interest; and the several Articles in full for the* 127*l.*: *the Mortgagor, within two Days, to give a Warrant of Attorney to confess Judgment to the Mortgagee, with a Defeazance for Payment of* 100*l.* *on a given Day, and* 50*l.* *half yearly, until the Balance of the general Account be paid: but the Mortgagee to be at liberty to sue out Execution for the whole Sum on default of any one Payment: the Mortgagee to pay* 10*l.* *towards the Tavern Expenses of the Arbitration; and the Mortgagor to pay the Residue: the Mortgagee forthwith to give the Mortgagor a* GENERAL RELEASE *of all Actions, &c., except the Warrant of Attorney awarded to be given by him: and the Mortgagor to give a similar Release* **to the Mortgagee; with the exception of his Right to Redeem on the Terms awarded.*

OF UMPIRE, ON GENERAL REFERENCE BY MORTGAGOR AND MORTGAGEE IN POSSESSION.

TO ALL TO WHOM THESE PRESENTS SHALL COME, I [*umpire*], esquire, of, &c. barrister at law, *send greeting*. (*a*) WHEREAS [*mortgagor*], late of, &c. in the parish of ——, in the county of ——, but now of —— in the said county, gentleman, being possessed of a certain farm, situate in the neighbourhood of ——, in the county of ——, by virtue of a certain indenture of lease, thereof to him granted by [*lessor*], esquire, for a certain term of years therein mentioned, and being indebted to [*mortgagee*], of ——, in the said county of ——, mercer, *did*, by a certain indenture of mortgage, bearing date on or about the —— day of ——, 18—, and made between the said [*mortgagor*], of the one part, and the said [*mortgagee*], of the other part, convey to the said [*mortgagee*] the said indenture of lease, and the premises thereby demised, to secure to the said [*mortgagee*] the payment of the sum of (five hundred) pounds, with lawful interest, from the day of the date of the said indenture of mortgage: *And* in which said indenture of mortgage there is contained a proviso for redemption of the said indenture of lease, and the premises thereby demised, on the payment by the said [*mortgagor*], his executors, administrators, or assigns, to the said [*mortgagee*], his executors, administrators, or assigns, of the sum of (five hundred) pounds, with lawful interest, on the —— day of ——, 18—. AND WHEREAS neither the sum of (five hundred) pounds, nor any part thereof, nor any interest thereon, was paid on the said —— day of ——, 18—; whereby the said mortgage became absolute at law: *And* the said [*mortgagee*] took possession of the said farm, on or about the —— day of ——, 18—; and hath ever since continued in possession thereof, and in receipt of the profits and proceeds thereof. AND WHEREAS various other transactions and matters of account have, for several years past, taken place between the said parties; and the said [*mortgagor*] hath lately filed a bill in the High Court of Chancery against the said [*mortgagee*]; and di-*vers disputes, animosities, and contentions have taken place between the said parties: *For* appeasing, pacifying, order-

Recital of a mortgage of a leasehold estate.

Recital that neither principal nor interest were paid on the day appointed; and that mortgagee is in possession.

Recital of various other matters of account; a bill in Chancery by mortgagor against mortgagee; and disputes between the parties:

For determin-

(*a*) This award was made under a general reference, without any recitals, *ut ante*, Vol. 2, p. 595.

OF UMPIRE, ON GENERAL REFERENCE BY MORTGAGOR AND MORTGAGEE IN POSSESSION.

ing, and determining whereof, the said [*mortgagee*] and [*mortgagor*] have submitted themselves, and are become bound each to the other, by their several obligations, bearing date on or about the —— day of —— last past, in the penal sum of (one thousand) pounds of good and lawful money of Great Britain; *With conditions* thereunder written, to stand to, obey, abide by, perform, fulfil, and keep the award of [*arbitrator*], of &c., gentleman, and [*other arbitrator*], of &c., gentleman, arbitrators, indifferently chosen, as well on the part and behalf of the said [*mortgagee*], as of the said [*mortgagor*], to arbitrate, award, order, judge, and determine of and concerning all and all manner of action and actions, cause and causes of action, suits, bills, bonds, specialities, judgments, executions, extents, quarrels, controversies, trespasses, damages, and demands whatsoever, at any time or times theretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed, or depending by or between the said parties, or either of them; *So as* the said award were made in writing, under the hands and seals of them the said [*two arbitrators*], on or before the —— day of —— then next ensuing; *But* if they the said [*two arbitrators*] should not make such their award on or before the said —— day of ——, *Then* that they the said parties, should stand to, obey, abide by, perform, fulfil, and keep the award, order, arbitrament, umpirage, final end and determination of such person as the said arbitrators should appoint as an umpire between them, in and concerning the premises; *So as* the said umpire should make his award or umpirage of and concerning the premises, on or before the —— day of —— then next ensuing. *And whereas* the said [*two arbitrators*] did, by a note in writing under their hands, bearing date the —— day of ——, 18—, written under the condition annexed to the said bonds, appoint (*b*) me the said [*umpire*], to be the umpire between them. AND WHEREAS the said [*two arbitrators*] did not make any award (*c*) of and con*cerning the premises on or before the said —— day of ——. NOW KNOW YE, that I

ing whereof, they have given cross bonds, with conditions to perform the award of two arbitrators,

on a general reference;

so as their award be made by a given time;

and in default thereof,

then to perform the award of an umpire, to be appointed by the arbitrators;

so as his award be made on a given day.

Recital of appointment of umpire by two arbitrators.

Recital that arbitrators made no award before the expiration of their time.

(*b*) As to the appointment of an umpire, *vide ante*, Vol. 2, p. 587-8.

(*c*) *Vide ante*, Vol. 2, p. 591.

OF UMPIRE, ON GENERAL REFERENCE BY MORTGAGOR AND MORTGAGEE IN POSSESSION.

Testatum. Award by an umpire,

the said [*umpire*], appointed umpire as aforesaid, having taken upon myself the charge of the said umpirage, and having deliberately and at large heard, examined, and considered the allegations, witnesses, and evidences of both the said parties concerning the premises, *do* thereupon make this my umpirage and final determination in writing, between the said parties, of and concerning the premises, in manner and form following: that is to say; *That* all proceedings on the said bill in Chancery shall cease, and be henceforth considered as null and void, as if the said bill had been dismissed by an order of the said court.

that proceedings in a Chancery suit shall cease:

And I do hereby adjudge, that, after giving the said [*mortgagor*] credit for the produce of the crops of hay and beans now remaining undisposed of on the said farm, and for the value of the after grass, up to the —— day of —— last, there remained due to the said [*mortgagee*], from the said [*mortgagor*], on the said —— day of ——, on the said mortgage, the sum of (two hundred and seventy-two) pounds (sixteen) shillings and (six) pence; exclusively of the two several sums of (one hundred and three) pounds (twelve) shillings and (six) pence, for the rent of the said farm; and (thirteen) pounds (four) shillings for tithes, both due on the —— day of —— last, but which were not paid by the said [*mortgagee*] on or before the said —— day of ——.

that, after giving credit for crops, certain sums are due to mortgagee, on account of mortgage, and mortgaged estate:

And I do hereby further adjudge, that the said [*mortgagor*] was, on the said —— day of ——, further indebted to the said [*mortgagee*], in the sum of (seven hundred and sixteen) pounds (fifteen) shillings and (eight) pence, on a general account, independently of the said mortgage, and exclusively of the sum of (one hundred and twenty-seven) pounds, being the estimated value of the several articles mentioned in a certain inventory, signed by the said [*mortgagee*], and now in the possession of the said [*mortgagor*], which several articles were left by the said [*mortgagor*] on the said farm when he quitted the possession thereof; for which I have given the said [*mortgagor*] credit, in taking the said general account; and also exclusively of the sum of (one hundred and seven) pounds, being the estimated value of a large *quantity of dung, now lying on the said farm, but not spread thereon; and for which I have not given the said [*mortgagee*] credit in

that further monies are due to mortgagee, on a general account;

exclusively of 127*l.*, the value of several articles for which the mortgagor has been given credit,

and of 107*l.*, the value of a quantity of dung, for which mortgagee has not been given credit:

OF UMPIRE, ON GENERAL REFERENCE BY MORTGAGOR AND MORTGAGEE IN POSSESSION.

stating the account between the said parties, relative either to the said mortgage, or to the said general account. And I do hereby award, that the said [*mortgagee*] shall forthwith cause the said quantity of dung to be spread on the said farm; and if the said [*mortgagor*] should, on the —— day of —— now next ensuing the date of these presents, or at any time before that day, pay to the said [*mortgaggee*] such sum of money, as on a fair account to be taken between them shall appear to be due to the said [*mortgagee*] on the said mortgage; and should either pay to the said [*mortgagee*] the said sums of (one hundred and twenty-seven) pounds, and (one hundred and seven) pounds, with interest on the latter sum from the said —— day of ——: *or* should, jointly with two responsible persons (*d*), to be approved of as hereafter mentioned, enter into a bond to the said [*mortgagee*], in the penal sum of *(four hundred and sixty-eight) pounds, with a condition to be void on the payment of the said several sums of (one hundred and twenty-seven) pounds and (one hundred and seven) pounds to the said [*mortgagee*], within six calendar months from the day of the date of such bond; together with in-

mortgagee to spread the dung;

and if mortgagor should, on a certain day, pay mortgagee such money as on a fair account shall appear to be due, and the 127*l.* and 107*l.*, and interest on the 107*l.*:

or should, jointly with two responsible persons, give a bond to mortgagee, for payment of the 127*l.* and 107*l.*, with interest on the 107*l.*

and should also,

[*56]

(*d*) At first sight, this might appear objectionable. For, if the award had been, that the mortgagee should be bound with sureties for payment of the money, the award as to the sureties would have been void; but, as such an award is only void for the excess, the mortgagee himself must, in such a case, have become bound. *Norwich* v. *Norwich*, cited Cro. Eliz. 4; 3 Leon. 62, *S. C.* 1 Roll. Abr. 259, pl. 7. 3 Vin. Abr. 35. *Coke* v. *Whorwood*, 2 Lev. 6; 2 Saund. 337, *S. C.* Where the arbitrator awarded that the defendant should pay to the plaintiff, on a certain day, 100*l.*, or should find two sufficient sureties, to be bound with him to the plaintiff, to pay the 100*l.* to the plaintiff by 20*l.* a-year, until the whole sum be paid; "the Court was clearly of opinion, that, although the award be set down and conceived in words disjunctive, yet, in law and in substance, it is single: for, as to the finding of sureties, the award is void, and so nothing is awarded but the payment of the one hundred pounds at the day." *Oldfield* v. *Wielmers*, 1 Leon. 140. But the reader will observe a distinction between both of these cases and the above. For, in the above case, the mortgagee is to deliver the possession of the farm to the mortgagor, if he should perform the condition precedent, of either paying the money, or procuring sureties for the payment. To such an award there does not appear to be any objection.

An award, requiring strangers to the submission to join as sureties for payment of the money awarded, is void as to the strangers.

But it is otherwise where sureties are required to join with a party, as a condition precedent to something being done by another party.

OF UMPIRE, ON GENERAL REFERENCE BY MORTGAGOR AND MORTGAGEE IN POSSESSION.

terest on the said sum of (one hundred and seven) pounds from the said —— day of ——: And should also, jointly with the said two responsible persons, execute a warrant of attorney to the said [*mortgagee*], of even date with the said bond, authorizing him to enter up judgment against them, in his Majesty's Court of King's Bench, for the said sum of (four hundred and sixty-eight) pounds; with a defeazance annexed to the said warrant of attorney, that it shall be void on payment to the [*mortgagee*] of the said sums of (one hundred and twenty-seven) pounds and (one hundred and seven) pounds, with interest on the latter sum as aforesaid, within six calendar months from the day of the date thereof, *Then* he the said [*mortgagee*] shall deliver to the said [*mortgagor*] the possession of the said farm, and the several articles specified in the inventory hereinbefore mentioned. And I do hereby further award and direct, that on the one side of the said account shall be stated, as well the said sum of (two-hundred and seventy-two) pounds (sixteen) shillings and (six) pence, together with interest thereon, from the said —— day of ——, to the day of the taking the said account, as all rent, tithes, taxes, and other reasonable and proper charges and expenses, including the expenses of spreading the said dung on the said farm, paid, disbursed, and incurred by the said [*mortgagee*] on account of the said farm; and on the other side of the said account shall be stated the profits and proceeds of the said farm, received or enjoyed by the said [*mortgagee*] from the said —— day of ——, to the day of settling the said account; but the said [*mortgagor*] shall not, in any shape, be charged with the expenses of carrying the produce of the said crop now remaining on the said farm undisposed of; nor shall he be charged with any expenses accrued on account of the garden and orchard, adjoining to the house on the said farm; nor have any credit given him on account of the produce of the said garden and orchard, * but shall be allowed in the said account, at the rate of (fifteen) pounds by the year, in the name of rent for the said house, garden, and orchard, from the said —— day of —— to the time of settling the said account: *Provided*, that the said two persons, to be offered by the said

jointly with the two responsible persons, execute a warrant of attorney to confess judgment for the penalty of the bond, with a defeazance, to be void on payment of the 127*l.* and 107*l.*, and interest on the 107*l.* from the date thereof, then mortgagee to deliver to mortgagor possession of farm, &c.

one side of the account between mortgagor and mortgagee to contain certain particulars,

and the other side to contain other particulars;

but the mortgagor not to be charged with certain expenses,

nor have credit for the produce,

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but to be allowed a rent:

the two sureties to be approved

OF UMPIRE, ON GENERAL REFERENCE BY MORTGAGOR AND MORTGAGEE IN POSSESSION.

[*mortgagor*] as sureties for the payment of the said sum of (two hundred and thirty-four) pounds, be approved by the said [*arbitrators*]; or in case they should not agree in the course of one week from the time when the names of the said persons proposed as sureties shall be given in by the said [*mortgagor*] to the said [*mortgagee*], then to be approved by me the said [*umpire*]: *And provided also*, that the said [*mortgagor*] shall give to the said [*mortgagee*] six weeks notice in writing of his intention to redeem the said mortgage; together with the names of the two persons he shall propose as sureties for the payment of the said several sums of (one hundred and twenty-seven) pounds, and (one hundred and seven) pounds, with interest on the latter sum as aforesaid, if he should propose to give such security, instead of paying the said sums. AND I do hereby further award and determine, that if the said [*mortgagor*] should not, in manner aforesaid, redeem the said mortgaged premises on or before the said —— day of —— now next ensuing, then he shall be for ever foreclosed of all equity of redemption thereof; and the said [*mortgagee*] shall become absolute owner of the said farm, and of the said indenture of lease, and of the said several articles contained in the inventory hereinbefore mentioned, fully, freely, and clearly discharged of all claim or demand of the said [*mortgagor*], and of all and every persons and person claiming by or through him, or in his right; and that in such case the said [*mortgagee*] shall take the said farm and indenture of lease, in full satisfaction for the said sum of (five hundred) pounds, secured by the said mortgage, and all interest thereon; and shall take the said several articles contained in the said inventory, as a full and complete satisfaction and discharge to the said [*mortgagor*] for the said sum of (one hundred and twenty-seven) pounds, for which I have given him credit as aforesaid in the said general account: AND I do hereby further order and award, that the said [*mortgagor*] *shall, within two days after the date of these presents, notice thereof being immediately given to him, execute to the said [*mortgagee*] a warrant of attorney, authorising the said [*mortgagee*] to enter up judgment against him for

by the arbitrators or umpire:

mortgagor to give mortgagee notice of his intention to redeem; with the names of intended sureties, if he should propose to give security, instead of paying the money:

if mortgagor should not so redeem, he to be for ever foreclosed;

and mortgagee to become absolute owner of farm, and several articles;

and in such case mortgagee to take farm in full for mortgage money, and interest, and the several articles in full for the 127*l.*:

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mortgagor within two days to give a warrant of attorney to confess judgment to mortgagee, with defeazance for payment of 100*l.*,

the sum of 1433*l.* 11*s.* 4*d.*, being double the amount of the said sum of 716*l.* 15*s.* 8*d.*, *With* a defeazance thereto annexed, that if the said [*mortgagor*] should pay to the said [*mortgagee*] the sum of (one hundred) pounds on or before the —— day of ——, 18—, and the sum of (fifty) pounds every six months afterwards; that is to say; on the —— day of ——, 18—, on the —— day of ——, 18—, and so on till the whole sum of (seven hundred and sixteen) pounds (fifteen) shillings and (eight) pence, shall be discharged, then the said warrant of attorney shall be void; *but* that the said [*mortgagee*] shall be at liberty to sue out execution on the said judgment for the whole sum of (seven hundred and sixteen) pounds (fifteen) shillings and (eight) pence, on default of any one payment as aforesaid, or for so much of the said sum as shall remain due and unpaid when such default shall be made: AND I do hereby further award, that the said [*mortgagee*] shall pay the sum of (ten) pounds towards the discharge of the bill of [*innkeeper*], for expenses incurred in the course of this arbitration at his house, called the Old Swan, in —— aforesaid; and that the said [*mortgagor*] shall pay to the said [*innkeeper*] the remainder of his said bill: AND I do hereby finally order and award, that the said [*mortgagee*] shall forthwith execute to the said [*mortgagor*] a general release (*e*) of all actions, cause and causes of action, judgments, suits, controversies, trespasses, debts, duties, damages, accounts, reckonings, and demands whatsoever, for or by reason of any matter, cause, or thing whatsoever, from the beginning of the world until the day of the date of the said bonds of arbitration; save and except the said warrant of attorney hereinbefore awarded to be executed by the said [*mortgagor*] to the said [*mortgagee*]; *And* that the said [*mortgagor*] shall forthwith execute to the said [*mortgagee*] a similar release, with the exception *only of his right to redeem the said mortgaged premises, on the terms and in the manner hereinbefore directed and appointed. IN WITNESS whereof, I the said [*umpire*] to

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on a given day, and 50*l.* half-yearly, until the balance of the general account be paid;

but mortgagee to be at liberty to sue out execution for the whole sum, on default of any one payment:

mortgagee to pay 10*l.* towards tavern expenses of arbitration;

and mortgagor to pay the residue:

mortgagee forthwith to give mortgagor a general release of all actions, &c.

except warrant of attorney awarded to be given by him: and mortgagor to give a similar release to mortgagee, with exception of his right to redeem on the terms awarded.

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(*e*) See the Releases in pursuance of this award, *post*, RELEASE, title AWARD.

Testimonium. both parts of this present award indented, have set my hand and seal, this —— day of ——, 18—.

Attestation. SIGNED, SEALED, AND DELIVERED (being first duly stamped (*f*)), in the presence of

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Stamp. (*f*) *Vide ante*, p. 4, n (*d*).

RESPECTING CLAIMS UNDER THREE WILLS.

AWARD *by* THREE ARBITRATORS, *on a Submission by several, respecting* CLAIMS UNDER THREE WILLS, *where the* TIME *for making the Award has been* ENLARGED BY THE PARTIES, *and where the Arbitrators find that T. T. bequeathed to J. T. the Interest of* 200*l. for Life; and after J. T.'s Decease, bequeathed the Principal to his Children; and that T. T. devised and bequeathed the Residue of his Real and Personal Estates (subject to his Debts, &c.) to G. H., and appointed him Executor: that the Estate of T. T., which came to the hands of G. H., was sufficient to discharge T. T.'s Debts, &c.: that a Freehold House in the possession of C. H. was part of T. T.'s Estate, and charged by him with Payment of his Debts, &c., and remains chargeable with the Bequest to J. T. and his Children: that T. H. as Executor of G. H., is entitled to* 100*l., on Mortgage of a Public House: and that all Demands of the Claimants under the Wills have been fully discharged;* THAT *C. H. shall, within one Month, deliver to T. H. all Deeds and Writings in her Custody relating to the* **Public House; and convey and deliver Possession of the Freehold Premises, and all*

RESPECTING CLAIMS UNDER THREE WILLS,

Deeds and Writings relating thereto, to T. H.: that C. H. shall retain all the other Effects which have or may come to her hands as Executrix of J. H. (except any Rents she may have received since his Death, on account of the Freehold Estate) in full satisfaction of all Claims under the three Wills, that T. H. shall, out of the Mortgage of the Public House, and out of the Freehold Premises, pay the Bequest to J. T. and his Children, that C. H. shall account for, and pay to T. H., within one Month, all Rents she has received on account of both Estates, since her Testator's Decease; that T. H. shall pay to C. H. all Interest she has paid to J. T. since the Decease of her Testator; that T. H. shall, within one Month, pay to C. H. 12l. 12s. in full for all Expenses of Repairs; that C. H. shall execute to T. H. a Release of all Demands under the three Wills; that C. H. shall, within one Calendar Month, deliver to T. H. all Writings respecting only the Estates of T. T. and G. H.; that, when C. H. shall have fully complied with the Award, T. H. shall execute to her a similar Release; that J. H. and J. M. and J. S., in Right of their Wives, shall execute similar Releases to T. H. and C. H.; that E. H. shall execute to C. H. a Bond in 800l., to indemnify her against all Demands of J. T. and his Children, and all others claiming through them, or under the Wills of T. T. and G. H.; and that T. H. shall pay the Expenses of the Arbitration.

TO ALL TO WHOM THESE PRESENTS SHALL COME. WE [*three arbitrators*], of &c., *send greeting*. WHEREAS [J. H.], of ——, in the county of ——, cooper, [J. M.], of ——, in the said county of ——, bookseller, claiming in right of his wife [*Jane* M.], late [J. H], *spinster; the reverend [J. S.], of ——, in the county of ——, clerk, claiming in right of his late wife [C. S.], formerly [C. H.],

Recital of cross bonds of submission from four to one, and from one to four;

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RESPETING CLAIMS UNDER THREE WILLS.

spinster, now deceased; and [C. H.], of —— aforesaid, spinster, by a certain bond or obligation, bearing date on or about the —— day of ——, 18—, became bound to [T. H.], of ——, in the said county of ——, yeoman, in the penal sum of one thousand pounds: *And* the said [T. H.], by another bond or obligation, bearing even date therewith, became bound to the said [J. H.], [J. M.], and [*Jane*] his wife, [J. S.] and [C. H.] in the like penal sum; *With conditions* respectively written under the said several bonds, that they the said [J. H.], [J. M.], and [*Jane*] his wife, [J. S.] and [C. H.], and the said [T. H.] respectively, should stand to, obey, abide by, observe, perform, fulfil, and keep the award, order, arbitrament, final end, and determination of us, the said [*three arbitrators*], arbitrators indifferently chosen, elected, and named, as well by and on the part and behalf of the said [J. H.], [J. M.], and [*Jane*] his wife, [J. S.] and [C. H.], as on the part and behalf of the said [T. H.], to arbitrate, award, judge, and finally determine concerning all and all manner of claim and claims which they, or any or either of them, had, or pretended to have, by, from, or under the several wills of [T. T.], long since deceased, [G. H.], deceased, and [J. H.], also deceased, respectively. AND WHEREAS, by indorsement in writing on each of the said several bonds, under the hands and seals of the said [J. H.], [J. M.], and [*Jane*] his wife, [J. S.] and [C. H.], and of the said [T. H.], bearing date respectively on or about the —— day of ——, 18—, the time for us the said arbitrators making our award in manner aforesaid was enlarged (*a*) until the eighth day of November then next ensuing. NOW KNOW YE (*b*), that *We* the said [*three arbitrators*], having taken upon ourselves the burthen of the said arbitration, and having heard, and duly and maturely *weighed and considered the several allegations, vouchers, and proofs brought before us, by and on behalf of the said parties in

with conditions to perform the award of three arbitrators concerning claims under three wills.

Recital of the parties having enlarged the time for making the award.

Testatum.

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Enlargement of time.

(*a*) As to the general doctrine respecting the enlargement of the time for making an award, *vide ante*, Vol. 2, p. 631, 637.

(*b*) This award is made in pursuance of the submission, *ante*, Vol. 2, p. 609.

RESPECTING CLAIMS UNDER THREE WILLS.

difference respectively, and having fully examined into their several alleged claims and interests under the several and respective wills of the said [T. T.], [G. M.], and [J. H.], deceased, *Do* find, that the said [T. T.], by his said will, among other specific legacies, gave and bequeathed to his nephew [J. T.], who is yet living, the yearly interest of two hundred pounds, at the rate of four pounds ten shillings for one hundred pounds for a year, for and during the term of his natural life: *And* that, after the decease of the said [J. T.], the said testator gave and bequeathed the said principal sum of two hundred pounds unto and amongst all and every the child and children of his said nephew [J. T.] who should be living at the time of the decease of the said testator, to be equally divided between them, share and share alike: *And* that the said [T. T.], by his said will, gave, devised, and bequeathed all the rest and residue of his estate, both real and personal, (subject nevertheless to the payment of his debts, legacies, and funeral expenses, with which he charged as well his real as his personal estate) to the said [G. H.], his heirs, executors, and administrators, whom he appointed sole executor of his said will. And *We* the said [*three arbitrators*] do further find, that the estate of the said [T. T.], which came to the hands and possession of the said [G. H.], deceased, was fully sufficient to satisfy and discharge all the debts and legacies, and funeral expenses of the said [T. T.], and the expenses attending the execution of his said will: *And* that a certain freehold house, with a close of land adjoining, and thereto belonging, with the appurtenances situate, lying, and being at ——, in the said county of ——, now in the possession or occupation of the said [C. H.], was part of the estate of the said [T. T.], and charged by him, in and by his said will, with the payment of his debts, legacies, and funeral expenses, as aforesaid; and remains subject to, and chargeable with, the bequest hereinbefore mentioned to the said [J. T.] and his children; *And further*, that the said [T. H.], as surviving executor of the will of the said [G. H.], is entitled to the sum of one hundred pounds, secured by mortgage on a certain freehold *house, with the appurtenances, situate at —— aforesaid, and known by the sign of the White Lion, in the te-

Arbitrators find that T. T. bequeathed to J. T. interest of 200*l.* for life:

and after J. T.'s decease, bequeathed the principal to his children.

and that T. T. devised and bequeathed the residue of his real and personal estates (subject to his debts, &c.) to G. H., and appointed him executor:

that the estate of T. T., which came to the hands of G. H. was sufficient to discharge T. T.'s debts, &c.

that a freehold house in the possession of C. H. was part of T. T.'s estate, and charged by him with payment of his debts, &c.

and remains chargeable with the bequest to J. T. and his children:

that T. H., as executor of G. H., is entitled to 100*l.* on mortgage of a public house:

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RESPECTING CLAIMS UNDER THREE WILLS.

and that all demands of the claimants under the wills have been fully discharged.

nure or occupation of [W. E.:] And *We* do further find, that all claim, interest, and demand which the said [J. H.], [*Jane* M.], or the said [J. M.] in her right, and the said [J. S.], in right of his said late wife, or either of them, ever had, in or upon the estate or effects, or under or by virtue of the wills of the said [T. T.], [G. H.], and [J. H.], or of either of them, have been fully satisfied and discharged.

Award that C. H. shall, within one month, deliver to T. H. all deeds and writings in her custody relating to the public house.

And *We* the said [*three arbitrators*], do hereby award, order, and adjudge, that the said [C. H.], her heirs, executors, or administrators, shall, within one calendar month from the day of the date hereof, deliver into the hands of the said [T. H.], or of his certain attorney, his executors or administrators, all deeds and other writings in her custody, possession, or power, relating to, or in any way affecting the said freehold house, with the appurtenances, known by the sign of the White Lion: *And* shall also, within one calendar month from the day of the date hereof, convey (*c*), by a good and sufficient conveyance and

and within one month convey and deliver possession of

Where the lessor of the plaintiff and the defendant in ejectment have referred their right to the lands to an arbitrator, who has awarded in favor of the lessor, the award concludes the defendant from disputing the lessor's title in an action of ejectment.

(*c*) Although an award cannot have the operation of conveying land, yet, as a defendant may conclude himself by his own agreement from disputing the title of the lessor in ejectment, an award under a submission to arbitration will give a good title, on which to maintain an ejectment. Thus, where ejectment was brought for lands in the county of Glamorgan, it appeared in evidence on the part of the plaintiff, that, in the year 1799, a prior ejectment having been brought on the demise of the same lessors against this defendant, for part of the same premises, which were leasehold, it was agreed to refer the matter to arbitration; and accordingly bonds of arbitration were entered into, and the two arbitrators awarded, that the lands were the property of Morris, and that the possession should be delivered to him: but the defendant not being satisfied with the award, applied to the Court of King's Bench to set it aside, but without effect; notwithstanding which, he still retained the possession of the premises: upon which this ejectment was brought. To support the title of the lessors of the plaintiff, the submission to arbitration, and the award, were given in evidence, and relied on as conclusive evidence of the title of Morris. The counsel for the defendant offered to go into evidence of his title, and objected that the award was not a sufficient title for the lessors of the plaintiff, for that the award could convey no title. It was urged, that it might have been enforced by rule of Court, or action on the bond, if the possession was refused by the defendant; but that it did not avail there. Lawrence J. "I am of a different opinion. The parties chose

assurance in the law, and deliver possession of the said freehold house and close, with the appurtenances, situate at —— aforesaid, and all deeds and other writings relating to, or in any way affecting the same, or the title thereof, to the said [T. H.], or his certain attorney, or his heirs. And *We* do further award, that the said [C. H.] shall retain for her own use and benefit all other the effects which came, or which may hereafter come, to her hands or possession, as executrix of the last will and testament of the said [J. H.], (*Save* and except any rents which she may have received since the decease of the said [J. H.], for or on account of the said estate at —— aforesaid,) in full satisfaction of all claim, interest, and demand which she has or ever had in or upon the estate and effects, or under or by virtue of the said several wills of the said [T. T.], [G. H.], and [J. H.], or of either of them. And *We* do hereby further award, that the said [T. H.] shall, out of the said mortgage on the said house, with the appurtenances, at ——, called the White Lion, and out of the said freehold house and close at ——, pay, satisfy, and discharge the bequest to the said [J. T.], and his children, *according to the direction of the said will of the said [T. T.],

RESPECTING CLAIMS UNDER THREE WILLS.

freehold premises, and all deeds and writings relating thereto, to T. H.; that C. H. shall retain all the other effects which have or may come to her hands as executrix of J. H. (except any rents she may have received since his death, on account of freehold estate) in full satisfaction of all claims under the three wills; that T. H. shall, out of the mortgage of the public house, and out of the freehold premises, pay the bequest to J. T.

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these gentlemen as judges to determine the right between them. They have determined that right, and their decision is binding on the parties, and I think is conclusive evidence of the right between them here." Verdict for the plaintiff. The learned Judge's opinion was confirmed by the Court of King's Bench, on a motion for a new trial, in Mich. T. 1802. *Doe* ex dem. *Greville* and others v. *Roper*, at Hereford, Oxford Summer Assizes, 1802. T.'s Mss. *Woodfall's* Landlord and Tenant, 420, 3d ed. *Doe* ex dem. *Morris* and others v. *Rosser*, 3 East, 11, *S. C.*

The above decision is founded on the peculiar nature of the principles which prevail in an action of ejectment. For an award does not confer the right to maintain an action of trover for a personal chattel. Thus, where all matters in difference between a landlord and tenant having been submitted to arbitration, it was awarded, amongst other things, that the latter should deliver to the former a stack of hay upon the premises, at a certain price to be paid for it by the landlord. The tenant refused to accept the money tendered, and to deliver the hay; upon which the landlord brought an action of trover for it: the Court held the action not maintainable, saying, that the remedy lay upon the award or the submission; but that, if the tenant had accepted the money tendered, such ac-

An award does not confer the right to maintain an action of trover for a personal chattel, unless the defendant accept the compensation awarded to be given for it.

RESPECTING CLAIMS UNDER THREE WILLS.

and his children: that C. H. shall account for and pay to T. H., within one month, all rents she has received on account of both estates since her testator's decease: that T. H. shall pay to C. H. all interest she has paid to J. T. since the decease of her testator: that T. H. shall, within one month, pay to C. H. 12*l.* 12*s.*, in full for all expenses of repairs: that C. H. shall execute to T. H. a release of all demands under the three wills: that C. H. shall, within one calendar month, deliver to T. H. all writings respecting only the estates of T. T. & G. H.;

And We do further award and order, that the said [C. H.] shall account for and pay to the said [T. H.], his executors or administrators, within one calendar month from the date hereof, all rents which she may have received for or on account of either of the estates at —— and —— aforesaid, since the decease of her said brother [J. H.]. And *We* do also award and order, that the said [T. H.] shall pay and refund to the said [C. H.] her executors or administrators, all sum and sums of money which she may have advanced or paid the said [J. T.] for and on account of the interest of the said sum of two hundred pounds mentioned in the will of the said [T. T.] since the decease of her said brother [J. H.]. And *We* do likewise award, order, and direct, that the said [T. H.] shall, within one calendar month from the date hereof, pay, or cause to be paid to the said [C. H.] the sum of twelve pounds twelve shillings, for and in full discharge of all expences which she has been at in the repairs of the said houses at —— and —— aforesaid, or otherwise howsoever. And *We* do further award, that the said [C. H.] shall seal and execute to the said [T. H.] a release of all demands for or on account of any claim or interest in or upon the estate and effects, or under or by virtue of the wills of the said [T. T.], [G. H.], and [J. H.], or of either of them: *And further*, that the said [C. H.] do and shall, within one calendar month from the date hereof, deliver unto the said [T. H.], his executors or administrators, all books, accounts, discharges, releases, and writings whatsoever, respecting only the estates of the

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*said [T. T.] and [G. H.], deceased, or either of them, and which are now in her custody, possessoin, or power: *And* that when the said [C. H.] shall have fully complied with this our award, in all things hereby ordered to be done by her, then the said [T. H.] shall seal and execute to her a similar release; *And* that the said [J. H.] and [J. M.], in

that, when C. H. shall have fully complied with award, T. H. shall execute to her a similar release: that J. H, and

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ceptance would have been a ratification of the award, and an assent on his part to the transfer of the property; without that, it could not be transferred by the mere force of the award. *Hunter* v. *Rice*, 15 East, 100. Caldw. 133. Therefore, where no compensation is awarded to be given for the personal chattel, a change in the property is not effected by the mere operation of the award.

right of his said wife, and the said [J. S.], in right of his said late wife, shall seal and execute similar releases to the said [T. H.] and [C. H.]. And *We* do also award and order, that the said [T. H.] do and shall execute to the said [C. H.] a bond in the penal sum of eight hundred pounds, under a condition to indemnify her the said [C. H.] against all demands of the said [J. T.] and his children, who were living at the time of the decease of the said [T. T.], or any person or persons claiming through them; and also against all and every other person or persons whomsoever claiming under the will and wills of the said [T. T.] and [G. H.], deceased, or either of them. And lastly, *We* do hereby award and order, that the said [T. H.] shall pay, or cause to be paid, all charges and expenses attending the present arbitration. In witness whereof, we the said [*three arbitrators*] have hereunto set our hands and seals respectively, the —— day of ——, in the year of our Lord 18—.

J. M., and J. S., in right of their wives, shall execute similar releases to T. H. and C. H.: that T. H. shall execute to C. H. a bond in 800*l.*, to indemnify her against all demands of J. T. and his children, and all others claiming through them, or under the wills of T. T. and G. H.; and that T. H. shall pay expenses of arbitration.

Testimonium.

Signed, sealed, and delivered, (being first duly stamped (*d*)), in the presence of

Attestation.

(*d*) As to the stamp, *vide ante*, p. 4, n. (*d*).

Stamp.

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RESPECTING CLAIMS UNDER A WILL, AND MATTERS OF ACCOUNT.

AWARD *by two Arbitrators, where a Testator devised and bequeathed all his Real and Personal Estates to Trustees, upon trust to pay his Debts, &c., and then, till his youngest Son came of age, to receive the Rents and Profits of his Real and Personal Estates, Business of Farming, &c., and apply the same in maintaining and clothing his Wife and Children, (excepting a Married Daughter); and when the youngest Son attained Twenty-one, to sell the Real and Personal Estates (excepting a*

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Close of Land which he devised to his Son C. P. in Fee); and to divide the Surplus Monies amongst his Wife and Children then living, equally, (deducting certain Sums as to Children he had advanced): J. B. P., the only acting Trustee, having paid various Sums to his Brothers in Part of their Shares, and having delivered to C. P. part of the Farming Stock, &c., and there being a Dispute as to the Sum to be allowed by C. P., and J. B. P. and T. P. having had Dealings together in Trade, as to which Disputes had arisen, all the Parties had agreed to refer the Executorship Accounts, and all other Differences between them, to the Award of the two Arbitrators, or an Umpire then named by the Parties; and the Parties having enlarged the Time for the Arbitrators making their Award; and it appearing to them, that the whole of the Real and Personal Estates had been converted into Money, (except a Piece of Copyhold Land, and a Leasehold Dwelling House,) THAT *J. B. P. shall, within one Month, surrender to J. G. and F. his Wife, in Fee, the Piece of *Copyhold Land;* [*68] *the Value whereof the Arbitrators have deducted from their Share: that J. B. P. shall, within one Month, assign to E. P. the Leasehold Dwelling House; and that E. P. shall be entitled to the Rents from Lady-Day last; the value whereof the Arbitrators have deducted from her Share: that J. B. P. shall forthwith pay G. P., I. G., and F. his Wife, S. P., and T. P., several specific Sums: that J. B. P. shall forthwith give E. P. a Bond, with two Sureties named, for securing her Share, with Interest, within Twelve Months: that J. B. P. shall forthwith give to R. P. an Infant, or to her Appointee, a Bond, securing her Share, with Interest, within Three Years; the Interest to be paid half yearly to the Mother, for R. P.'s use: that the Bonds shall be prepared*

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at J. B. P.'s Expense; that C. P. shall forthwith pay J. B. P. the Sum found to be due from him, after deducting his Share under the Will, that J. B. P. shall forthwith pay the Expenses of the Reference and Award, the Arbitrators having made him an Allowance for that purpose, that all Parties entitled to receive Money under the Award, shall give proper Receipts, and, if required, give a GENERAL RELEASE *to the Person paying such Money, but at his Expense,* PROVISO, *that if the Representatives of an Attorney should recover a certain Sum, claimed of the Executor, (but which the Arbitrators believe to be unjust) then Seven-Eighths of the Sum recovered, and of the Costs, shall be paid to J. B. P. by each of the other Parties:* PROVISO, *that if T. P. should be compelled, as Acceptor, to pay a Bill drawn by J. B. P., then J. B. P. shall repay him the same.*

Recital of articles of agreement,

TO ALL TO WHOM THESE PRESENTS SHALL COME, WE [*two arbitrators*], of &c., *send greeting*. WHEREAS, by articles of agreement in writing, under the hands and * seals of [J. B. P.], of &c., tanner, and [E. P.], of —— aforesaid, widow; [C. P.], of the same place, farmer; [T. P.], of &c., currier; [G. P.] of —— aforesaid, tanner; [S. P.], of —— aforesaid, currier; and [J. G.], of the same place, farmer, and [F.] his wife, (late [F. P.]), bearing date on or about the —— day of —— last past, *Reciting* that [C. P.], late of —— aforesaid, —— deceased, by his will, bearing date on or about the —— day of ——, 18—, devised and bequeathed *All* his real and personal estates, both freehold and copyhold, unto his wife [E.], his son [J. B. P.], and his friend [S. A.], of &c., farmer, their heirs, executors, and administrators, *Upon trust*, in the first place, to pay thereout all his just debts, funeral and testamentary expenses; and then, *Upon trust*, to hold the same estates and premises until his youngest son [S. P.] should attain his age of twenty-one years, in case he should so long live; and during such his minority to

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Reciting that testator devised and bequeathed all his real and personal estates to trustees,

upon trust to pay his debts, &c.

and then till his youngest son came of age,

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to receive the rents and profits of his real and personal estates, business of farming, &c.

and apply same in maintaining and clothing his wife and children (excepting a married daughter):

and when the youngest son attained twenty-one, to sell the real and personal estates, (excepting a close of land which he devised to his son C. P. in fee),

and to divide the surplus monies amongst his wife and children then living, equally, except his son T., to whom he bequeathed 50*l.* less,

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and except 50*l.* less for a daughter, on account of advancements:

appointment of executors:

and reciting testator's death without revoking his will, leaving his widow and children him surviving:

and that J. B. P. alone proved the will:

and that, by an agreement between the widow and such of the children

receive and take the rents, issues, and profits arising from his said real and personal estates, business of farming, &c., and apply the same in the respective maintenance and clothing of his said wife [E.], [son J.], and all his other sons and daughters (except as to the clothing and maintenance thereout of his daughter [F.], then the wife of the said [J. G.]); *And* when his said son [S.] should arrive at the age of twenty-one years, as aforesaid, he directed his said trustees, or the survivor of them, to sell and dispose of all his said real and personal estates as aforesaid, or such of them as were convertible into money, (except his small close of inclosed land or ground lying in the lordship of —— aforesaid, which he gave and devised to his son [C. P.], party thereto, and his heirs and assigns for ever): *And* after such sale and conversion of his estates into money, and payment of all necessary expenses attending such sales, to divide such money arising as aforesaid unto and equally amongst his said wife [E.], son [J.], and all the others of his sons and daughters as should be then living, share and share alike, except his son [T.], to whom he bequeathed fifty pounds less than an equal share, he having received a compensation, by being put out apprentice; and also except the like sum of fifty pounds less for his daughter [F.], the wife of the said * [J. G.], she having then had an advancement of that amount since her marriage: *And* that the said testator appointed his said wife [E.], son [J.], and the said [S. A.], joint executors and trustees of his said will: *And reciting* that the said [C. P.], (the testator) departed this life soon after making the said above in part recited will, without revoking or altering the same; leaving the said [E. P.], his widow, and the said [J. B. P], [C. P.], (party hereto), [T. P.], [G. P.], [S. P.], [F.], the wife of the said [J. G.], and [R. P.], his children, him surviving: *And reciting*, that the said [J. B. P.] alone proved the said will in the Prerogative Court of the Archbishop of Canterbury, and took upon himself the burthen of the execution thereof: *And reciting*, that, by a certain agreement, made and entered into in the year 18—, by and between the widow and such of the children of the said testator as were then of age; which said agreement being mislaid, reference could not then be had to it; but the purport thereof was,

as appeared by the draft of the said agreement, that the said parties thereto did agree with each other, that an immediate valuation and division of the said testator's personal estate and effects should take place; and that the money arising therefrom should be paid and divided to and amongst them, in such parts, shares, and proportions as is mentioned in the said testator's will, (the share of the said [S. P.] and [R. P.] only excepted): *And reciting*, that the said [J. B. P.] proceeded to a valuation and sale of the property comprised in the said above in part recited will; but no actual division of the said property was then, or had ever since been made; nor did any of the said legatees know what was the amount of their respective shares: *And reciting*, that the said [J. B. P.], as such executor as aforesaid, had paid various sums of money, at different times, to his said brothers, or some of them, in part liquidation of the sum which they were entitled to under the said will of their father; and had also delivered to, or permitted his brother, the said [C. P.], to possess himself of the whole, or a considerable part of the farming stock and effects of the said testator; and that there was then a dispute or difference as to the sum which was to be paid or allowed by the said [C. P.], for such *farming stock and effects: *And reciting*, that the said [J. B. P.], and his brother the said [T. P.], had dealings together in trade; and some disputes had arisen between them relative to such dealings: *And reciting*, that all the said persons, parties thereto, were desirous of ascertaining the amount of the respective portions or shares to which they were entitled under the will of the said [C. P.], (deceased); as also, what sums of money, or stock, effects, or other satisfaction, the said widow, or any of the children of the said [C. P.] (deceased), might have received in part liquidation of such respective portions or shares; and also that the said parties were at the same time extremely desirous of avoiding all litigation, disputes, or controversy touching or concerning their late father's property; and had therefore mutually agreed to submit and refer the investigation of the whole of the executorship accounts of the said [J. B. P.]; and all transactions touching or concerning the fulfilment of the trust reposed in and exercised by

as were then of age,
which being mislaid,
it appeared by the draft thereof, that the parties agreed that an immediate valuation and division of testator's personal estate should be made in the shares mentioned in his will, (shares of two infants only excepted):
and that J. B. P. made a valuation and sale, but no division had been made, nor were the shares ascertained:
and that J. B. P. had paid various sums to his brothers, in part of their shares;
and had delivered to C. P. part of the farming stock, &c.
[*71]
and that there was a dispute as to the sum to be allowed by C. P.,
and that J. B. P. and T. P. had dealings together in trade, as to which disputes had arisen:
and that all the parties were desirous of ascertaining their shares under the will;
and what sums, &c. any of them had received;
and being desirous of avoiding litigation, had agreed to

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refer the executorship accounts, and all other differences between them, to the award of two arbitrators, or an umpire then named: and that the arbitrators and umpire should have power to examine the parties and their witnesses on oath; and determine what sums remained due to the several parties under the will; and what sums were due from any of the parties to the other;

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and order the same to be paid, in such manner, and such securities and releases given, as arbitrator or umpire should deem proper; and award by whom costs of reference should be borne: reciting agreement witnessed, that the parties mutually covenanted to perform award of arbitrators or umpire; so as the award or umpirage should be made by given days. Recital of the parties having

the said [J. B. P.], under and by virtue of the said above in part recited will; and had also mutually agreed to submit and refer all disputes and differences, of what nature or kind soever, then subsisting between the said [J. B. P.], and any of the persons parties thereto, to the final award of the said [*two arbitrators*]; and in the event of their disagreeing, or not delivering or having ready their award at the time thereinafter mentioned, then to the final award of [*umpire*], of &c., farmer: *And* the said parties did also further mutually agree, that the said arbitrators and umpire should have full power and authority to examine all or any of the said parties thereto, as well as their respective witnesses, on oath, if they should think necessary; and should also ascertain, award, and determine, what sum or sums of money then remained due to the several persons, parties thereto, under or by virtue of the above recited will of the said [C. P.] (deceased); and should also have full power to determine what sum or sums of money was or were due from any of the persons, parties thereto, to the other of them; and should also order and direct the same to be paid at such times, and in such manner, and such security or securities to be given for the same in the mean time, and such releases, or other discharges given for the *same when so discharged, as they the said arbitrators or umpire should deem proper; and should also award by whom, and in what proportions, the costs of this reference should be borne: *It was, by the now reciting agreement, witnessed,* that for effectuating the purposes aforesaid, the said parties thereto did mutually covenant, promise, and agree to and with the others and other, that they respectively would in all respects well and truly perform and keep the award, arbitrament, judgment, and determination of the said arbitrators or umpire; *so* as the award of the said arbitrators should be made in writing, under the hands of the said arbitrators, ready to be delivered to such of the said parties as should require the same, on or before the —— day of —— then next; or under the hand and seal of the said umpire, on or before the —— day of —— then next. And whereas, by an indorsement on the said agreement, bearing date on or about the —— day of —— last past, and under the hands of all the said parties to the

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said agreement, they the said parties mutually and reciprocally consented and agreed, that the time for the said arbitrators making the said award should be enlarged to the —— day of —— then next: *And* that they would, in all other respects, abide by the terms of the said agreement. Now know ye, *That We*, the said arbitrators, having taken upon us the burthen of the said reference, and having examined all such witnesses as were produced before us by the said parties respectively; and having fully weighed and considered all the allegations, proofs, and vouchers made and produced before us; and it appearing to us that the whole of the real and personal property of the late [C. P.] (deceased), hath been converted into money, (save and except a certain small piece or parcel of copyhold land, situate at —— aforesaid; and a certain leasehold dwelling-house and premises, situate in the parish of, &c., now in the occupation of ——), *Do* award, order, and adjudge, *That* the said [J. B. P.] shall, within one month from the date of this award, duly surrender, or otherwise convey and assure unto the said [J. G.] and [F.] his wife, their heirs and assigns, or as they shall direct, and at their own costs and charges, *All that* the aforesaid close, piece or parcel of copyhold land, * situate in —— aforesaid, and now in the occupation of ——; and which we do adjudge to be of the value of fifteen pounds, and have accordingly deducted the amount thereof from the sum which we find to be due to the said [J. G.] and [F.] his wife, from the said [J. B. P.]. And we do further award, that the said [J. B. P.] shall, within one month from the date of this award, assign unto the said [E. P.], her executors, administrators, or assigns, at her or their expense, *All that* the aforesaid leasehold dwelling-house and premises, situate in —— aforesaid, for all the residue and remainder of the term now to come therein: *And* we do direct, that the said [E. P.] shall be entitled to the rents and profits thereof from Lady Day last, we having adjudged the residue of the said term to be of the value of 100*l.*, and have accordingly deducted the amount thereof from the sum which we found to be due from the said [J. B. P.] to the said [E. P.]. And we do further award, that the said [J. B. P.] shall forthwith pay,

enlarged the time for the arbitrators making their award.

Testatum.

It appearing that the whole of real and personal estates had been converted into money, (except a piece of copyhold land, and a leasehold dwelling-house), award that J. B. P., the only acting trustee and executor, shall, within one month, surrender to J. G. and F. his wife, in fee, the piece of copyhold land;

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the value whereof the arbitrators have deducted from their share:

that J. B. P. shall, within one month, assign to E. P. the leasehold dwelling-house; and that E. P. shall be entitled to the rents from Lady Day last:

the value whereof the arbitrators have deducted from her share;

that J. B. P. shall forthwith pay G. P., J. G.,

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and F. his wife, S. P. and T. P., several specific sums:

that J. B. P. shall forthwith give E. P. a bond, with two sureties named, for securing her share with interest, within twelve months:

or cause to be paid, unto the respective parties hereinafter named, the sums following: that is to say; unto the said [G. P.] the sum of 431*l.* 17*s.* 9*d.*; unto the said [J. G.] and [F.] his wife, the sum of 393*l.* 19*s.* 9*d.*; unto the said [S. P.] (*a*), the sum of 330*l.* 1*s.* 9*d.*; and unto the said [T. P.] the sum of 122*l.* 18*s.* 8*d.* AND we do further award, that the said [J. B. P.] shall forthwith give unto the said [E. P.] one good and sufficient bond, under the hand and seal of the said [J. B. P.], and also under the hands and seals of [W. B.], of &c., gentleman, and [H. S. B.], of the same place, gentleman, who have consented to join (*b*) the said [J. B. P.] in such bond, securing to her the said [E. P.] the sum of 277*l.* 12*s.* 9*d.* twelve months after the date of such bond; with lawful interest from the date thereof: *And* that the said [J. B. P.] shall also forthwith give unto the said [R. P.], who has not yet

that J. B. P. shall forthwith give to R. P., an infant, or to

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*attained the full age of twenty-one years (*c*), or to whom

Where a fund is given to those living at an infant's majority or death, the fact of vesting should be stated.

(*a*) The fact that S. P. had attained his age of twenty-one years, is not stated; but it should have been. For, until that event arrived, or otherwise became impossible by his death, all the shares were contingent. *Vide ante*, p. 69.

(*b*) *Vide ante*, p. 55, n. (*d*).

It seems, that, in ordinary cases, a trustee cannot be awarded to pay an infant's share.

(*c*) If the award had been, that the trustee should have paid the infant's share, it would have been unreasonable; *vide ante*, p. 14; because there was no person who could give a valid discharge: and, if he had paid it to the parent or guardian, he might have been compelled to repay it to the infant on her coming of age. *Vide ante*, Vol. 2, p. 406. And it seems, that the trustee could not have been properly directed to pay the share into the Bank, under the 36 Geo. 3, c. 52, s. 32, because he has the residue in the character of a trustee, and not as an executor or administrator. *Vide ante*, Vol. 2, p. 406.

The submission of an infant is voidable, if not void.

These observations assume the submission to have been properly made; but the validity of this part of the award seems doubtful, because the infant is a stranger to the submission. *Vide ante*, p. 15. It has been held, that an infant may submit to arbitration, but that it is optional with him whether he will abide by the award when he comes of age. *Knight* v. *Stone*, Jon. 164; *Stone* v. *Knight*, Lat. 207; Noy, 93, *S. C.*; 7 Bac. Abr. Gwill. ed. 67, *Void and voidable*, (C). However, it has also been held, that the submission of an infant is void, and not merely voidable. *Rudston* v. *Yates*, Mar. 112, 141; *Gill* v. *Russell*, Freem. 139; *Bowyer* v. *Blorkside*, 3 Lev. 17; [and see *Godfrey* v. *Wade*, 6 J. B. Moore, 488]; and, upon principle, this seems to be the better opinion. The Court of Chan-

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she may appoint, one good and sufficient bond, under the hand and seal of the said [J. B. P.], and also under the hands and seals of the said [W. B.], and [H. S. B.], who have consented to join the said [J. B. P.] in such bond, securing to her the said [R. P.] the sum of 352*l.* 4*s.* 6*d.* three years after the date of such bond, with lawful interest in the mean time; such interest to be paid half yearly to the said [E. P.], for the use and benefit of the said [R. P.]; and the receipt of the said [E. P.] for such interest to be a sufficient discharge to the said [J. B. P.]. And we do award, that the said before mentioned bonds shall be pre-*pared at the sole expense of the said [J. B. P.] And we do further award, that the said [C. P.], the party to the said above in part recited articles of agreement), shall forthwith pay, or cause to be paid, unto the said [J. B. P.] the sum of 730*l.* 8*s.* 11½*d.*, which is the sum we find to be due to the said [J. B. P.] from the said [C. P.], after deducting the share which the said [C. P.] is entitled to under the will of his late father. And further, we do hereby award, that the said [J. B. P.] shall forthwith pay, or cause to be paid, the whole of the charges and expenses attending this reference, and the making of this award, we having made the said [J. B. P.] an allowance towards the payment thereof, previous to apportioning the respective sums due from time to time to the other parties hereto; And we do further award, that all or any of the said parties, who shall be entitled to receive any sum or sums of money under this award, shall, on the receipt thereof, sign and give proper and legal receipts for the same; and also at the same time, or at any time afterwards, execute and give to the party paying such sum or sums of money, if he shall require it, a release of all claims and demands whatsoever

her appointee, a bond securing her share with interest, within three years; the interest to be paid half yearly to the mother, for R. P.'s use; that the bonds shall be prepared at J. B. P.'s expense:

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that C. P. (the son) shall forthwith pay J. B. P. the sum found to be due from him, after deducting his share under will:

that J. B. P. shall forthwith pay the expenses of reference and award;

the arbitrators having made him an allowance for that purpose:

that all parties entitled to receive money under the award shall give proper receipts:

and, if required, give a general release to the person paying

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cery will not decree the performance of an award which shall bind an infant. *Cavendish* v. ———, 1 Ch. Cas. 279.

But, though an infant cannot submit, yet his guardian may submit for him, and bind himself that the infant shall perform the award. *Roberts* v. *Newbold*, Comb. 318. Consequently, any other person, as well as a guardian, may be bound for an infant's performing an award. In this respect, there is a deficiency in the submission on which the above award is made.

But a guardian, or any other person, may bind himself that an infant shall perform an award.

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such money, but at his expense: proviso, that if the representatives of an attorney should recover a certain sum claimed of the executor, (but which the arbitrators believe to be unjust) then seven-eighths of the sum recovered, and of the costs, shall be paid to J. B. P. by each of the other parties:

Proviso that if T. P. should be cempelled, as acceptor, to pay a bill drawn by J. B. P., then J. B. P. shall repay him same.

against the party so paying such money, from the beginning of the world up to the day of the date of this award: such release or releases nevertheless to be prepared at the sole expense of the person requiring the same. PROVIDED ALWAYS, and we do hereby award and adjudge, that, in case the executors, administrators, or other legal representatives of [*solicitor*], late of &c., attorney at law, deceased, should recover by the verdict of a jury, all or any part of a certain claim of 200*l.*, which has been claimed of the executor of the said [C. P.], deceased, (but which, upon strict examination, we believe to be unjust, and cannot be substantiated), then, and in such case, we do adjudge and award, that seven-eighths of any sum which may be so recovered as aforesaid, as well as seven-eighths of any costs which may be incurred in consequence thereof, shall be repaid to the said [J. B. P.] in the proportions following; that is to say, one-eighth part thereof by each of them the said [E. P.], [J. G.], [G. P.], [C. P.], [T. P.], [S. P.], and [R. P.]. PROVIDED ALSO, and we do further direct, that, in the event of the said [T. P.] being at *any future time compelled to pay any sum or sums of money in consequence of his being the acceptor of a certain bill of exchange drawn by the said [J. B. P.] some time in the year 18—, for 188*l.*; and which bill is now in the hands of [J. C. G.] of &c., aforesaid, banker; then and in such case, he the said [J. B. P.] shall repay, or cause to be repaid, to the said [T. P.], all such sum or sums of money as he may have been compelled to pay as acceptor of such bill of exchange as aforesaid. IN WITNESS whereof, we have hereunto set our hands and seals, the —— day of ——, 18—,

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Testimonium.

AS TO TESTATOR'S INTENTION, LEGATEES' CLAIMS, AND PARTNERSHIP ACCOUNTS.

AWARD *by three Arbitrators respecting the Estate and Effects of a Testator, on a Submission by the Executors, and the Persons interested,* THAT *the Testator's Intention was to*

AS TO TESTATOR'S INTENTION, LEGATEES' CLAIMS, AND PARTNERSHIP ACCOUNTS.

give, devise, and bequeath to several Persons, certain enumerated Legacies and Property; which the Arbitrators award accordingly: that the Legatees and Devisees, and those claiming under them, shall remain satisfied therewith: that the Executors shall pay P. M. G. a certain Sum in full of all Demands on the Testator's Estate, for the Balance of Account: that One Half of the Book Debts owing to the Testator and P. M. G., as Partners, belongs to P. M. G.; and the other half to the Testator's seven Grandchildren: that all the Furniture in a House, at the Testator's Death, belongs to E. A.: and that the Residue of the Testator's Estate shall be equally divided amongst P. M. G. and the Testator's Six other Grandchildren: that the Executors shall pay P. M. G. One Half the Book Debts, and to each of the Grandchildren an equal Portion of the other Half; and their unpaid Proportion of **the Shipping Concern, pursuant to an Agreement between the Executors and P. M. G. (which Agreement the Arbitrators confirm); and also of such other Part of the Shipping Concern as is not included in the Agreement; and of the Residue of the Testator's Estate, when from Time to Time received, to the Amount of* 140*l.: that the Devisees and Legatees, and those claiming under them, shall execute Releases for Monies paid: that the Executors shall pay the Expenses of Reference: and that, on Performance of the Award, all Differences between the Parties shall cease.*

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TO ALL TO WHOM THESE PRESENTS SHALL COME. *We,* [*three arbitrators*], of &c., *send greeting* (*a*). WHEREAS in and by a certain indenture, bearing date, &c. and made between &c., (*reciting nearly the whole of the inden-*

Recital of deed of submission.

(*a*) This award is made in pursuance of the submission, *ante*, Vol. 2, p. 626.

AS TO TESTATOR'S INTENTION, LEGATEES' CLAIMS, AND PARTNERSHIP ACCOUNTS.

Testatum.

ture, ante, Vol. 2, p. 626.) *As* by the said indenture, relation being thereunto had, may more fully and at large appear. Now know ye, that we the said [*three arbitrators*], having taken upon ourselves the charge of the said award, and having heard, and duly and maturely weighed and considered the several allegations, vouchers, and proofs brought before us by and on behalf of the said parties respectively, are of opinion, *That* the intention (*b*) of the *said

[*78]
That the testa-

(*b*) Though a Court of equity, where the only object of the bill is to set aside an award, will not permit the plaintiff to discuss legal objections to it, but will confine him to those for partiality and corruption; yet it seems, that, if the bill, besides praying to set aside the award, pray also for an account, he will be permitted to make legal objections, in order to let in such an account. *Vide Champion* v. *Wenham,* Ambl. 245.

On a bill merely to set aside an award, the plaintiff cannot go into legal objections; but it seems he may, if the bill be also for an account.

If indeed the arbitrators appear to be mistaken in a *doubtful* point of law, the award may be permitted to stand, though the Court, after great deliberation, should be of a different opinion. *Dictum per* Lord Hardwicke, *Ridout* v. *Paine,* 3 Atk. 495.

If the arbitrator appears to be mistaken in a doubtful point of law, the award may stand.

Thus, in the case of the above submission, where no lawyer could doubt upon the point of law, this distinction was laid down by the Court of King's Bench:—That where the arbitrators, meaning to follow the law in their determination, happen to mistake it, this is a good reason for setting aside their award, so far as it is affected by that mistake: but where, knowing what the law is, or laying it entirely out of their consideration, they make what they conceive, under all the circumstances of the case, to be an equitable decision, it is no objection to the award that in some particular point it is manifestly against law.

If the arbitrator, meaning to follow the law, mistake it, this is a good reason for setting the award aside; but not where, regardless of the law, he makes an equitable decision.

Statements of the facts and circumstances on which the above award was founded.

The circumstances of the above case were as follow: a man, having five grandchildren by a deceased daughter, and a daughter living who had two children, by his will, gave to his eldest grandson by his deceased daughter, a legacy of two thousand pounds; to one of his granddaughters by his deceased daughter, two thousand pounds; to each of the other three children of his deceased daughter, and to each of the two children of his living daughter, one thousand pounds; and to his living daughter a pecuniary legacy, about which it was disputed whether it was intended by the testator to be one, two, or three thousand pounds: to his daughter, and to several of his grandchildren, he gave several real estates, in words which conveyed only an estate for life to each of the respective devisees. There were other bequests, about which there was no dispute; and of the residue of his personal property, consisting of various particulars, and amounting in the whole to about twelve thousand pounds, he made no disposition. He made his two sons-in-law executors. His eldest grandson by his deceased daughter claimed the half of the book debts, and a considerable sum be-

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tor's intention was, to give, devise, and bequeath to several persons, certain enumerated legacies and property;

[*testator*] deceased, was, by his last will and testament, to dispose of, give, devise, and bequeath the following legacies and property; namely, unto his widow [E. M.], the interest or dividends arising from four thousand pounds, three *per centum* consolidated bank annuities; and the use of the household furniture, plate, and utensils in and appertaining to the testator's house at Plaistow, wherein he died, his chariot, a horse, and cow, (valued together at 64*2l.* 1*s.* 1*d.*) during her natural life; *And*, from and after her decease, the said annuities, household furniture, plate, and utensils, to be the property of, and divided amongst, his seven grandchildren, the above named [P. M. G.], &c., by even and equal portions: *Unto* the said [P. M. G.,] &c., all his

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sides, as partner in his trade. The executors resisted this claim; in consequence of which a general submission was made to the award of three gentlemen, who were supposed to have been well acquainted with the intentions of the deceased. The parties to the submission were the executors of the first part; the eldest grandson by the deceased daughter, of the second part; and the same grandson, the husband of the living daughter, and the rest of the grandchildren, and the husbands of such of them as were females and married, of the third part. The arbitrators, by their award, among other things, for which the award was not impeached, directed that the several devisees of the real estate should hold the several parts respectively devised to them, in fee simple; that the executors should pay to the eldest son of the deceased daughter a considerable sum, as the balance due to him as partner with the testator; that they should also pay him another sum, being the moiety of the book debts due to the partnership; and that the remainder of the book debts, together with all the residue of the personal property, should be equally divided among the seven grandchildren of the testator. The submission to this award was made a rule of the Court of King's Bench, under the statute. On the part of the husband of the deceased daughter, an application was made to the Court to set aside this award, on these objections: First, that the arbitrators had declared the eldest grandson by the deceased daughter of the testator to have been a partner in his trade; whereas, in fact he never had been such partner, and the question of partnership had never been discussed by the arbitrators in the presence of the applicant; and, secondly, that the arbitrators had, in two particulars, taken upon themselves to *make* a will for the testator, instead of *explaining* what he had made; first, that they had given to the several devisees of the real estates, estates in fee simple, whereas the testator had given them only estates for life; the con-

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the testator's, interest or concern in shipping, and the benefit to arise therefrom, share and share alike: *Unto* the said [P. M. G.], the house then occupied by his father, the said E. G.] the elder: *Unto* the said [L. B.] the house then occupied by [Mrs. F.]: *And* unto the said [E. G.], the younger, the house then occupied by [Mr. G.]; all which houses are situate in or near Broad Street, in the said parish of St. George in the East: *Unto* the said seven grandchildren, the following specific legacies, or sums of money: that is to say; to the said [P. M. G.] and [L. B.], the sum of two thousand pounds each; to the said [E. G.] the younger, [Jos. G.], [John G.], [P. A.], and [S. A.], one thousand pounds each; *And* to his daughter the said

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sequence of which was, that the reversion in fee belonged to the living daughter, and to the eldest son of the deceased daughter, in coparcenary; and, secondly, that they had directed the residue of the personal property to be divided equally among the *seven* grandchildren of the deceased; whereas, by the statute of distributions, it belonged in equal moieties to the *living* daughter, and to the *five* grandchildren by the *deceased* daughter. The first objection was fully answered by the affidavits of the arbitrators, and of the eldest grandson of the testator by his deceased daughter; and by the same affidavits it appeared, that, with respect to the real estates, the award had only confirmed some agreements which had been made among the parties themselves. With respect to the objection to the manner in which the arbitrators had disposed of the residue of the personal property, the Court, suggesting the distinction above stated, directed that the arbitrators should make an additional affidavit, and state whether they had intended to follow the statute of distributions, or had laid it entirely out of their consideration, and decided on equitable circumstances. The arbitrators made such additional affidavit, in which they stated, "that in disposing of the residue among the seven grandchildren, they did not conceive they were making any distribution of it according to any fixed rules of law upon the subject, but that they were dealing out to the several parties interested what appeared to them to be, according to the best of their judgment, under all the circumstances of the case, strict and impartial justice, agreeably to what they believed to have been the intention of the testator." The Court thought this a sufficient answer to the objection, and discharged the rule. *Ainsley* v. *Goff*, Hilary Term, 1799; Kyd on Awards, 351, 2d ed. In this case, the Court acted as a Court of equity. It might have been taken as a preliminary objection to the application, that the Court could not, under the statute, enter into *legal* objections to

Affidavit of arbitrators, that in making their award they were not governed by the rules of law.

[E. A.], the sum of three thousand pounds; and also the house and land situate in Plaistow aforesaid, then and now in the occupation of the said [J. A.]; together with his coach and horses. THEREFORE *We do* hereby appreciate and fix the aforesaid devises, legacies, and bequests, made, given, and bequeathed, or intended to be made, given, and bequeathed, to the said [E. M.], [P. M. G.], [L. B.], [E. G.] the younger, [Jos. G.], [John G.], [P. A.], [S. A.], and [E. A.] respectively, in and by the last will and testament of the said [P. M.], deceased, in manner above mentioned. AND we do award and confirm the same to the said devisees and legatees, their heirs and assigns respectively. AND we order and direct the said several devisees and

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which the arbitrators award accordingly:

that the legatees and devi-

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the award in this stage; but that objection was not urged. [In *Ainsley* v. *Goff*, the Court directed an affidavit to be made by the arbitrators, explanatory of their intention: but it should be observed, that, in a late case, where the terms of an award were clear upon the face of it, the Court refused to receive an affidavit by one of the arbitrators, in explanation of their meaning. *Gordon* v. *Mitchell*, 3 J. B. Moore, 241].

If an arbitrator profess to decide upon the law, and he mistake it, the Court will set aside the award; although the arbitrator's reasons do not appear on the face of the award, but only on another paper delivered therewith.

Where the arbitrator professed to decide upon the law, and delivered in, together with the award, a paper, containing observations upon the evidence before him, together with his reasons for deciding as he had done, the Court set aside the award for a mistake in point of law; observing, that the paper having been delivered under such circumstances, the statement of the arbitrator's reasons contained in it was to be considered in the same light as if it had appeared upon the face of the award itself; and as it was evident from thence, that the arbitrator had proceeded upon a ground unsupported by law, whereas he plainly intended to decide according to law, the award was not such as he intended it to be. So it seems it would be if such reasons appeared in any other authentic manner to the Court. *Kent* v. *Elstob*, 3 East, 13; and see *Aubert* v. *Maze*, 2 Bos. & Pull. 371. But in *Delver* v. *Barnes*, 1 Taunt. 48, the Court of Common Pleas ruled, that it is not a sufficient ground for an application to set aside an award, on the face of which no objection appears, to state facts from which it may be inferred that an incorrect notion of the law of the case subsisted in the mind of the arbitrator. On an application for an attachment for non-performance of an award, it is competent to the parties *to object to the award*, for any illegality apparent on the face of it, though the time for applying to set it aside is expired. *Pedley* v. *Goddard*, 7 Durnf. & East, 73. *Ante*, Vol. 2, p. 579. But the Court will not listen to *an application to set aside an award*, for any defect whatsoever, after the

But facts cannot be stated by the parties in order to infer an incorrect notion of law. On an application for an attachment, the parties may *object* to the award for apparent illegality, at any

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legatees, and all and every person or persons claiming, or to claim for, by, or from or under, them, or any of them, to be and remain fully satisfied and contented with the sums and proportions of the estate, goods, chattels, and credits of the said [*testator*], deceased, hereinbefore specified, so far as relates thereto, or to any part thereof. And we do order and direct that the said [E. G.] the elder, and [J. A.], as executors as aforesaid, do and shall well and truly pay, or cause to be paid, unto the said [P. M. G.], at &c., on &c., between the hours &c., the sum of 1,690*l.*, in full of all claims and demands the said [P. M. G.], or his representatives, can or may have on the estate of the said [*testator*], deceased, for the balance of account

sees, and those claiming under them, shall remain satisfied therewith; that the executors shall pay P. M. G., a certain sum in full of all demands on testator's estate, for balance of account;

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time; but the parties cannot *apply* to set aside an award, for apparent illegality, after the time limited by the statute. The Court will not set aside an award on the ground that the arbitrator was mistaken in law, unless the principles of law on which he has decided appear on the face of the award.

time limited by the statute, 9 & 10 Wm. 3, c. 15; 7 Durnf. & East, 73; although such defect appear on the face of the award. *Lowndes* v. *Lowndes*, 1 East, 276.

And the Court will not set aside an award on the ground that the arbitrator was mistaken in law, unless the principles of law upon which he has decided appear on the face of the award. *Anon.* 1 Chit. Rep. 674. And where the law and fact are referred to an arbitrator, the award will not be set aside, unless there appear to be error in law on the face of it. *Doe* v. *Thompson*, 1 Chit. Rep. 674, (*a*). *Bouttilier* v. *Thick*, 1 Dowl. & Ryl. 366. Thus, where a cause, involving a question of law, was referred to a barrister, under a rule of Court, to settle all matters in difference between the parties; and he made his award thereupon, but the question of law did not appear on the face of the award; the Court, considering that it was the intention of the parties to refer the decision of the merits, as well on the matter of law as of fact, to the arbitrator, refused to open the award again, on a suggestion of the arbitrator's mistake in point of law on the construction of a contract between the parties. Lord *Ellenborough* said, "that there was a great difference in these cases, in considering the object of the reference, and the description of the person to whom the decision is confided by the parties. In ordinary cases, where questions of fact are referred to one who is supposed to be competent to deal with such questions, though not with questions of law, and a question of law should happen to arise, on which he decides in a manner disturbing the whole justice of the case, the Court would enter into the inquiry, and correct what was erroneous in the decision. But where a doubtful question of law arose between parties, it often happened, that on such very account they agreed to refer the matter to the arbitration of a gentleman of the profession, meaning to refer the decision of the matter of law to him, and to abide by his determination of it."

due to him as partner with the said late [*testator*] at the time of his decease: *And* we do direct the said [P. M. G.] to receive the said sum accordingly. AND we do hereby further award and order, that one moiety of the book debts due and owing to the said [*testator*], deceased, and the said [P. M. G.], as partners in trade, and which have been taken by the said [P. M. G.], at and for the sum of 1,375*l.* shall be the property of the said [P. M. G.]; and that the remaining moiety thereof shall be the property of and divided among the said seven grandchil-

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that one half of book debts owing to testator and P. M. G., as partners, belongs to P. M. G.

And his lordship added, "I fear it is impossible to lay down any general and certain rule upon this subject, in what cases the Court will not suffer an award to be opened: it must be subject to some degree of uncertainty, depending upon the circumstances of each case. But it is sufficient to say, that, in the present case, where the merits, in law and in fact, were referred to a person competent to decide upon both, we will not open the award, unless it can be shewn to be so notoriously against justice, and his duty as an arbitrator, that we can infer misconduct on his part." The other judges agreed thereto; Mr. Justice *Le Blanc* adding, that "where the question of law necessarily arises upon the face of the award, there the Court must take notice of it." *Chace* v. *Westmore*, 13 East, 357. So where two parties agreed to be bound by the opinion of a professional man, on the construction of an act of parliament, who gave his opinion in favour of one; such opinion was considered as final and conclusive, though it recommended the printed statute to be compared with the parliament roll before the matter was settled, under a doubt whether the statute was not misprinted. For the opinion when given was in the nature of an award, and became final between them, and the Court would not look into it to see whether it was strictly right. If the statute was misprinted, it was incumbent on the plaintiff to shew that fact: not having done so, it must be taken to be correct. *Price* v. *Hollis*, 1 Maule & Selw. 107. [So, where an action was referred that had been brought to determine, whether fees for the interment of bodies in the chancel of a church were to be paid to the rector or to the vicar, and the arbitrator simply stated that the sum sought to be recovered had been properly paid to the vicar, the Court refused to entertain the objection that the award was contrary to law, as the illegality did not appear on the face of the award; though it was attempted to distinguish this case from the two preceding, on the ground that it was solely a question of law, and not a mixed question of law and fact. *Cramp* v. *Symonds*, 7 J. B. Moore, 434; *S. C.* 1 Bing. 104. Again, where a motion was made for a rule to shew cause why the award should not be

and other half to testator's seven grandchildren; that all the furniture in a house at testator's death belongs to E. A.;

dren of the said [*testator*], deceased. We do also award unto the said [E. A.] all the household furniture and utensils that were in the house now occupied by the said [J. A.], at the decease of the said late [*testator*], together with every article then in, upon, or in any wise belonging or appertaining to, the said house and premises.

and that the residue of testator's estates shall be equally divided.

And we do moreover award and order, that all the rest, residue, and remainder of the estate, goods, chattels, and credits of the said [*testator*], deceased, shall be the pro-

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referred back to the arbitrator, to strike out charges which he had improperly allowed, (namely an apothecary's charges for attendances), the Court refused the motion, observing that affidavits could not be received to shew what particular charges had been allowed. *Gensham* v. *Germain*, 11 J. B. Moore, 1. So, where the application for setting aside an award was founded on affidavits stating that the arbitrator, before he made his award, had intimated his opinion upon the law of the case, which it was contended was erroneous, it was held that the application could not be received upon such grounds. *Price* v. *Jones*, 2 Younge & Jervis, 114. See also *Sharman* v. *Bell*, 5 Mau. & Selw. 504; *Hall* v. *Alderson*, 3 Bing. 476. In another case, where the objection was, that it appeared by the amount of the sum awarded, that the arbitrator had, in the computation of the sum, improperly allowed interest in an action for money had and received, the Court refused to interfere, the award itself being silent as to the grounds of the decision. *Payne* v. *Massey*, 9 J. B. Moore, 666.] Nor will the Court set aside an award, on the ground that the arbitrators have decided contrary to law, unless the law be clear upon the subject; and, therefore, where the captain of a ship, at an intermediate port, in order to pay for repairs, had necessarily sold part of the cargo†, at a price higher than it would have fetched at the port of destination, and upon a reference, to settle the average loss between the ship-owners and charterers, the arbitrators (who were mercantile men,) allowed for the actual value of the goods when sold, and not for the price they would have fetched at the port of destination; the Court refused to set aside the award. *Richardson* v. *Nourse*, 3 Barnw. & Ald. 237.

Nor will the Court set aside an award on the ground that the arbitrator has decided contrary to law, unless the law be clear upon the subject.

[It seems that the improper rejection of evidence is a ground for impeaching an award. See *Morgan* v. *Mather*, 2 Ves. jun. 16; *Anderson*

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† As to the power of the master of a ship, in a case of necessity, to sell part of the cargo, or hypothecate the ship, cargo, and freight, at maritime interest, to pay the expenses of repairs, &c., in a foreign port, by virtue of the universal law of nations, *vide infra*, Index to the Notes, title Hypothecation.

Sale and hypothecation by master of ship.

perty of, and divided among, his said seven grandchildren, the said [P. M. G.], [L. B.], [E. G.] the younger, [Jos G.], [John G.], [P. A.], and [S. A.], by even and equal portions. And we do likewise award, order, and direct, that the said [E. G.] the elder, and [J. A.], as executors as aforesaid, do and shall well and truly pay, or cause to be paid unto the said [P. M. G.], one moiety of the said book debts; and to each of them the said [P. M. G.], [J. B.] the younger, in right of his wife, the said [L. B.], [E. G.]

amongst P. M. G. and the testator's six other grandchildren:

that the executors shall pay P. M. G. one half of the book debts, and to each of the grandchildren an equal portion of the other half;

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v. *Darcy*, 18 Ves. 449. And so would be a clearly admitted mistake as to the facts. But a declaration by *one* of several arbitrators, that, if he had seen a letter which had been found since the award was made, he would have acted differently, was held in a late case not to be sufficient for this purpose. *Ib.*]

In equity, an award cannot be disturbed for mistake, upon a question of law referred.

A Court of equity seems generally inclined to go farther than a Court of law in supporting an award, where a question of law only is referred. Thus, under a general reference of all matters in dispute, the arbitrator, a clergyman, had made an award deciding all the questions: and on a motion to rectify an error in law, alleging no other ground but that the arbitrator had made a wrong decision upon a question of law, the Lord Chancellor (Lord *Eldon*), refused the motion, and said, "If a question of law is referred to an arbitrator, he must decide upon it; and though he decides wrong, you cannot help it. In a case before Lord *Rosslyn*, Mr. *Mansfield* and I endeavoured to open an award on the ground of mistake of the arbitrator; the question referred being as to the vesting of a legacy: but it was held it would not do." *Ching* v. *Ching*, 6 Ves. 282. The report does not state whether the error in law appeared on the face of the award; which circumstance, in questions of this kind, is the point of distinction in Courts of law. In a subsequent case, an award was made under a general reference of all matters in dispute, and an injunction was applied for to prevent the execution of it, on the ground of mistake by the arbitrator; but no application was made to set aside the award. Lord *Eldon* said, "the Court of King's Bench have lately (*Kent* v. *Elstob*, 3 East, 18) quarrelled with a decision of Lord *Rosslyn*, followed by me, (*Ching* v. *Ching*,) upon this point. I confess, I think those decisions right. If there is a question of law, and the parties choose to refer that to the decision of an arbitrator, instead of the Court, why may not he take all moral considerations into his judgment? If they refer to a person to decide all matters in difference according to law, and he means to decide according to law, and mistakes, the Court will set that right. But, if a distinct ques-

If an arbitrator, under a general reference, meaning to decide according to law, mistakes, the Court will set that right; yet, if the parties choose to refer matters of law, meaning to have the judgment of the arbitrator upon them, instead of that of the Court, the award, though not agreeable to law, cannot be therefore impeached.

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and their unpaid proportion of the shipping concern, pursuant to an agreement between the executors and P. M. G.,

the younger, [Jos. G.], [John G.], [P. A.], and [S. A.], an equal portion of the other moiety of the said book debts; and also their respective proportion, or such part thereof as has not been already paid, of the interest or concern in shipping of the said [*testator*], deceased, pursuant to an agreement entered into between the said [E. G.] the elder, and [J. A.], his executors as aforesaid, and the said [P. M. G.], amounting, as appears by the said agreement, to the sum of 1,575*l.*; and which agreement we

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tion of law, and nothing else, is referred, as there was in the case before Lord *Rosslyn*, and the parties choose to say, they will not take the decision of the court, but will take whatever an arbitrator shall say is the law between them, why may they not so agree? Lord *Rosslyn* thought, and very rightly, in my opinion, that if the parties mean by the reference to say, that A.'s law shall be the law between them, they are competent so to agree. Here, every thing almost that could be referred, was matter of law. If, upon such a reference, the arbitrator chosen as being supposed abundantly competent to decide in matter of law, the award is to be questioned in this way, the decision amounts to nothing; and very little progress would be made towards the end of suits. The question is, whether, by the reference to arbitration, they mean to make the arbitrator *pro hâc vice* the lawgiver between them. Before I decide this motion, I wish to look at the case in the Court of King's Bench." On the next day, his Lordship said, " the case in the Court of King's Bench does not clash with what passed yesterday. Mr. Justice *Grose* puts it upon a principle, which I think clearly right, that the arbitrator meant to determine according to law, and was mistaken. Mr. Justice *Lawrence* also says, that, from his reasons, it clearly appears, that he has mistaken the law upon which he meant to proceed. They understood the arbitrator as stating upon the face of the award, that, if his award is not according to law, he does not mean it shall be his award." And about nine months afterwards the Lord Chancellor incidentally took an opportunity of noticing this point; observing, that the decision of this Court did not appear to be understood by those who cited it; and repeating his opinion, that, if questions of right and fact are referred to arbitration, the arbitrator is bound to decide according to law; but, if parties choose to refer a dry naked question of law to a man, as their mutual friend, to decide that question between them, instead of having the decision of a Court of justice upon it, they are at liberty to do so: and this Court will not interfere. *Young* v. *Walter*, 9 Ves. 364. In a subsequent case in the Exchequer, a cause was referred from the assizes to the award of a barrister, who rejected a witness as inadmissible in point of law, the plaintiff having represented her as his

If an arbitrator, a barrister, reject a witness as inadmissible

do direct, shall be finally confirmed; and also of such other part of the said shipping, or interest therein, of the said deceased, as has not been included in the said agreement; and likewise of the rest, residue, and remainder of his estate, goods, chattels, and credits, not otherwise disposed of in or by his last will and testament, as the same shall be from time to time collected, gotten in, and received by the said executors, to the amount of one hundred and forty pounds, or upwards. And we do direct the said devisees

(which agreement the arbitrators confirm); and also of such other part of shipping concern as is not included in agreement; and of the residue of testator's (which agreements the arbi-

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wife for a long time, and with whom he had actually cohabited for many years, and by whom he had had several children; the arbitrator being of opinion that, under these circumstances, her evidence was not admissible in his favour. Although the point of law was doubtful, yet the Court held, that as every thing, both of law and fact, must, in this instance, have been referred to the arbitrator, a person of competent judgment to decide, they would not disturb the award. *Campbell* v. *Twemlow*, 1 Price, 81. In *Steff* v. *Andrews*, 2 Mad. 9, Sir *Thomas Plumer*, Vice-Chancellor, held, that, if a point of law be referred to the decision of an arbitrator, the parties are bound by his decision, whether right or wrong; unless fraud or corruption is imputable. See also, to the same effect, *Wood* v. *Griffith*, Swans. 55. But in *Blennerhassett* v. *Day*, 2 Ball. & Bea. 120, Lord *Manners*, Lord Chancellor of Ireland, said, "when parties refer their legal rights to arbitration, the arbitrators must award according to law, else the award is not binding." However, as his Lordship did not refer to any case in support of his *dictum*, it cannot be considered of any authority, opposed, as it is, by the numerous cases referred to on this point.

in point of law, the Court will not set aside his award on that ground.

If a point of law be referred to an arbitrator, the award is binding, whether right or wrong, unless fraud or corruption is imputable. Lord *Manners's dictum* to the contrary cannot, it seems, be supported.

An arbitrator is not bound by a rule of practice adopted by Courts of law or equity, for general convenience; and therefore, where, on a reference of a Chancery suit, and all matters in difference between the parties, the arbitrator had allowed interest (when it would not be allowed by a Court of law or equity), the Court refused to set aside the award on that ground. For the submission of the suit, and all matters in difference, gave the arbitrator an authority to adjust the account between the parties; and an authority to do that carries with it an implied authority to allow interest, unless expressly excluded by the terms of the submission. It is this very circumstance which, in many cases, makes a decision by an arbitrator preferable to that of the Court; because he is not bound by the strict rules of practice, but may do full justice, according to the particular circumstances of the individual case. *In re Badger*, 2 Barn. & Ald. 693.

An arbitrator is not bound by a rule of practice adopted by Courts of law or equity.

However, it is certainly clear, that no Court will permit directions in an

No Court will

estate, when from time to time received, to the amount of 140*l.*:
that devisees and legatees, and those claiming under them, shall execute releases for monies paid;
that the executors shall pay expenses of reference:
[*88]
and that, on performance of award, all differences between the parties shall cease.

and legatees respectively, and every other person claiming, or to claim, by, from, or under them, or any of them, from time to time, when lawfully required, to sign, seal, execute, and deliver good and sufficient releases, acquittances, and discharges for all monies paid or to be paid to them, by the said executors, by virtue of the aforesaid will, and of these presents. And we do moreover award that the said [E. G.] the elder, and [J. A.], as executors as aforesaid, do and shall pay into the hands of —— and ——, public notaries, the sum of twelve pounds twelve shillings, at or before the delivery of this our award, for charges of *the present reference: *And* upon performance of this our award, all differences and disputes in anywise subsisting by and between the said parties, or any of them, previous to the day of the date of the said recited indenture, touching the premises, shall utterly cease and determine. In witness, &c.

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sustain an award which would compel the party to become a trespasser on the rights of others;
or if the demand appear on the award to be founded on an illegal transaction.
But, if the fact do not appear on the award, the arbitrator may award a conscientious demand, though illegal;
or, if the question be of mixed law and fact, he may allow a transaction apparently illegal.

award to stand, which are so contrary to the common rules of law, that the party, by his observance of them, would become a trespasser on the rights of others. 1 Roll. Abr. 249 (G); *Ashton's* case, 1 Roll. Abr. 249, pl. 10; *Lynsey* v. *Ashton*, 1 Roll. Abr. 247 (E), pl. 2. Godb. 255; *Alder* v. *Savill*, 5 Taunt. 454, *ante*, p. 14; Caldwell, 59. And where an arbitrator awarded a sum of money to one party, and having stated in his award the grounds on which he conceived it to be due, it appeared that part arose out of a transaction which, though the arbitrator did not seem to be aware that it was illegal, yet the Court determined it to be so, and they set the award aside for so much. *Aubert* v. *Maze*, 2 Bos. & Pull. 371. But if an arbitrator chooses to put the law out of the question, and to award the payment of a conscientious demand, arising out of a transaction which he knows to be illegal, he may do so, if the fact do not appear on the face of the award. *Delver* v. *Barnes*, 1 Taunt. 48. And although an arbitrator, on a question of mixed law and fact, has allowed transactions apparently illegal, as premiums of insurance on a voyage to an hostile port, the Court of Common Pleas will not, on that account, set aside the award. *Wohlenberg* v. *Lageman*, 6 Taunt. 254.

ON INTESTACY, OF DEBT, AND DISTRIBUTIVE SHARE.

AWARD *that an* INTESTATE *was indebted to C. D., one of his Children,* 139*l.* 6*s.: that C. D. is entitled to receive* 1,400*l. as his distributive Share of the Residue, after paying all Debts, except the* 139*l.* 6*s., and after paying two-thirds of that Sum: that a Chancery Suit shall cease: that the Administrators shall, on or before the 21st February, pay C. D. the* 1,400*l., with Interest from December: that, on Payment of the* 1,400*l., and Interest, C. D. shall, if required, execute to the Administrators a* GENERAL RELEASE, *at their Costs.*

Award that intestate was indebted to C.D., one of his children, 139*l.* 6*s.*:

NOW KNOW YE, *That* I the said [*arbitrator*], having &c., do make this my award in writing of and concerning (*a*) the matters so to me referred as aforesaid, in manner following: that is to say; I do award, adjudge, and declare, that the said [*intestate*(*b*)], deceased, who was the

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De premisis.

(*a*) The award need not state that it is made concerning the matters in difference, but it is prudent to state it. *Vide ante*, p. 18, n. (*c*).

An executor or administrator may, as such, submit to arbitration.

(*b*) An executor or administrator may, as such, submit a matter in dispute between another and himself in right of his testator. Therefore, when the executor of a parson submitted to arbitration a dispute between the present incumbent and himself, as executor of the last incumbent, on account of some dilapidations of the parsonage, alleged to have been permitted by the default of the testator, and in his life no objection was made to the want of power in the executor to submit. *Browne* v. *Meverell*, Dyer, 216 b. But if the arbitrator do not award as much as the executor or administrator would be entitled to at law, it will be a *devastavit* for the residue, and he must account for the deficiency to those who are interested in the effects of the testator or intestate. Com. Dig. *Administration*, (I. 1). *Assets*, (C.) *ad finem.* 1 Bac. Abr. Gwill. ed. 207, 208. As if an executor submit to arbitration, and it be awarded, that for 70*l.* he release an obligation given to his testator in 100*l.* for performance of covenants which were broken by the obligor, the 100*l.* shall be assets, for the

But, if so much is not awarded as the executor would be entitled to at law, it will be a *devastavit* for the residue.

ON INTESTACY, OF DEBT, AND DISTRIBUTIVE SHARE.

that C. D. is entitled to receive 1,400*l.*, as his distributive share of the residue, after paying all debts except the 139*l.* 6*s.*, and

father of the said [C. D.], [E. F.], and [G. H.], was, at the time of his death, justly indebted to the said [C. D.] in the sum of 139*l.* 6*s.* AND I further award, adjudge, and declare, that the said [C. D.], as one of the three children of the said [*testator*], deceased, was and is justly entitled to have and receive the sum of 1,400*l.* as his distributive share of the clear residue of the personal estate and effects of the said [*testator*], deceased, left after full payment of all the debts of the said [*testator*], deceased, except the

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submission is his own act. *Anon.* 3 Leon. 53; Wentw. Off. Ex., Wils. ed. 71, 160.

A general submission by an executor or administrator, is an admission of assets, and he cannot afterwards plead *plene administravit.*

If a man, in the character of executor or administrator, expressly binds himself, his heirs, executors, and administrators, to perform an award to be made on the subject of disputes between his testator or intestate and another, and also concerning all other matters, accounts, &c., between the parties, or either of them, and the arbitrator award generally, that, as executor or administrator, he shall pay a certain sum, he cannot, in an action on the bond, avail himself of a plea, "that he had fully administered, and that he had no assets of his testator or intestate at the time of the submission, or since:" the plea being inapplicable to the case; for the party, by such a submission, enters into a personal engagement to pay whatever the arbitrator shall direct, without any regard to the question of assets. *Barry* v. *Rush*, 1 Durnf. & East, 691; 5 Durnf. & East, 8. [And see *Wansborough* v. *Dyer*, 2 Chit. Rep. 40; *post*, p. 142].

But it has been held, that the mere act of submission, as executor or administrator, is not, of itself, an admission of assets: [*Contrà Robson* v. ——, 2 Rose, 50; *Riddell* v. *Sutton*, 5 Bing. 200]: and that, if an executor or administrator, as such, submit to arbitration, and the arbitrator simply declare a debt due from the testator or intestate, specifying the amount, without saying by whom it is to be paid, the executor or administrator is not precluded from the plea of "fully administered." And it was also held, that in such a case the plaintiffs cannot, in an action of *assumpsit* against the executor or administrator, in that character, give evidence of a verbal promise to pay whatever shall be found due; because, in the first place, the action seeks to recover the demand out of the testator's or intestate's effects, and if there be no assets, the personal promise by the representative is *nudum pactum.* *Pearson* v. *Henry*, 5 Durnf. & East, 6; Kyd, 39, 2d ed. But it seems, that, in an action against the defendant, independently of his character of executor, the plaintiffs might have recovered on his verbal submission. *Vide ante*, Vol. 2, p. 633, *ultimo.* *Purlsow* v. *Bailey*, 2 Ld. Raym. 1040; Wms. n. 1 Saund. 62 b, (5). However, the above case of *Pearson* v. *Henry*, is not to be understood as

But it has been held, that a submission to an award by an administrator, is not an admission of assets, where the arbitrator only declared a debt to be due; and that a promise by an administrator to pay the sum to be awarded, is *nudum pactum*, if there be no assets.
It seems an action might be maintained on the verbal submission.

said sum of 139*l.* 6*s.*; and after payment of two-thirds of the said last-mentioned sum. And I do further award, order, and direct, that the said suit shall be stayed, and no further prosecuted: *And* that the said [E. F.] and [G. H.], parties to this reference, and who are the administrators of the said [*intestate*], deceased, and who have received and possessed themselves of his personal estate and effects, shall and do, on or before the 21st day of February, 18—, pay to the said [C. D.] the said sum of 1,400*l.*,

ON INTESTACY, OF DEBT, AND DISTRIBUTIVE SHARE.

after paying two-thirds of that sum: that a Chancery suit shall cease: that the administrators shall, on or before 21st February, pay C. D. the

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establishing a general principle: for where, under a reference between the plaintiff and the defendant, an administratrix, the arbitrator had ascertained the amount of the plaintiff's demand, and directed the defendant to pay it; and, on shewing cause against a rule for an attachment for non-performance of the award, it was urged, that the administratrix had no assets, and that the submission to an award by an administratrix was not an admission of assets, as was said in *Pearson* v. *Henry;* but Lord *Kenyon*, C. J., said, the decision in *Pearson* v. *Henry* must be taken with reference to the facts of that case. There the arbitrator only ascertained the amount of the demand, without ordering the administrator to pay it: but here the arbitrator has awarded that the defendant, the administratrix, shall pay the plaintiff's demand. The submission to arbitration by the administratrix, was a reference not only of the cause of action, but also of the other question, whether or not the administratrix had assets. And as the arbitrator has awarded the defendant to pay the amount of the plaintiff's demand, it is equivalent to determining as between these parties that the administratrix had assets to pay this debt. The defendant therefore is concluded by this award, though it will not operate as an admission of assets in any other action to be brought by any other creditor. *Worthington* v. *Barlow*, 7 Durnf. & East. 453. Therefore, wherever it is doubtful whether the executor or administrator will have sufficient assets to answer the sum likely to be awarded, it should be expressly declared, that he shall not be answerable any further than the assets extend. *Vide post*, p. 142.

If an arbitrator, under a reference between A. and B., an administratrix, award that B. shall pay a certain sum as the amount of A.'s demand, B. cannot afterwards object that she had no assets, but may be attached for non-payment: but it is no admission of assets in favour of any other creditor.

When it is doubtful whether the executor will have sufficient assets, it should be declared that he shall not be personally liable.

A demand as executor or administrator is within a general submission to an award. Thus, in an action of debt upon an arbitration bond, it appeared, that the plaintiff and the defendant thereby submitted all matters in difference between them, or either of them. The arbitrators awarded 30*l.* to the plaintiff in full of all demands, either in her own right, or as executrix of her husband. And, on demurrer, it was insisted, that the arbitrators had exceeded their authority. And Carth. 118 was cited, and the case put of a grant of *omnia bona et catalla sua*, which does not pass goods *en autre droit*. But the Court held, that the submission was general enough: for the demand as executrix was a matter depending between

A demand as executor or administrator is within a general submission to an award,

1,400*l.*, with interest from December: that, on payment of the 1,400*l.* and interest, C. D. shall, if required, execute to administrators a general release, at their costs.

together with interest for the same, at the rate of 5*l. per centum per annum*, from the 21st day of December, 18—. And I further award, order, and direct, that, upon payment of the said sum of 1,400*l.*, with such interest as aforesaid, the said [C. D.] shall and do, if thereto required, execute unto the said [E. F.] and [G. H.], at their costs and charges, a general release of all claims and demands at law, and in *equity, upon or in respect of the personal estate of his late father. (*Add award as to Costs.*) In witness, &c.

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although it be by the husband of an executrix or administratrix.

them. And 1 Roll. Abr. 246, pl. 2, 3; 3 Buls. 65, are strong to this purpose. And though in Cro. Car. 433, [*quære, Lumley* v. *Hutton*, Cro. Jac. 447], there is an averment, that both sorts of demands were submitted, yet the Court held it was not necessary. And the plaintiff had judgment. *Elletson* v. *Cummins*, 2 Str. 1144. So, if a woman be indebted to J. S. in a certain sum, as administratrix to J. D., and she takes husband, and the husband and J. S. submit all matters between them to the award of W. N., he may make an award of this debt, which is due by the husband and wife, though it be due in the right of his wife, and as administratrix; for he is now chargeable by the intermarriage. *Lumley* v. *Hutton*, 1 Roll. Abr. 246, pl. 2; Cro. Jac. 447; Roll. Rep. 269, *S. C.* So, upon such a submission, the arbitrator may make an award of a debt due to a woman as executrix. 1 Roll. Abr. 246, pl. 2; 3 Vin. Abr. 51.

A CREDITOR NOT A PARTNER WHEN SECURITIES WERE GIVEN.

AWARD *on an Agreement by a Deed of Composition between a Debtor, the Trustees, Creditors, and a Creditor, the Validity of whose Securities for a Debt was disputed, on the ground that he was a Partner when they were given, that the Matters in Difference should be referred to an Arbitrator, who should determine whether the Creditor was, or was not a Partner, when the Securities for the Debt were given; and whether he does, or does not, still remain a Partner as to the other Creditors; and whether he is, or is not, entitled in*

A CREDITOR NOT A PARTNER WHEN SECURITIES WERE GIVEN.

Law to recover on his Securities, before the other Creditors have been fully paid: and if it should be awarded that he is entitled to recover, then he is to receive the Benefit of the Composition Deed equally with the other Creditors: but if it should be awarded, that he is a Partner, or was so when the Securities were given, then he shall, when required, convey to the Trustees all his Interest in the Partnership Effects, and in the Premises covenanted by the Deed to be conveyed, to be held in Trust for the other Creditors: THAT *the Creditor was not a Partner when the Securities were given; nor does still remain a Partner with respect to the other Creditors: and that he is entitled to recover on the Securities, before the other Creditors are fully paid.*

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Recital of a deed of composition between a debtor, the trustees, creditors, and a creditor, the validity of whose securities for a debt was disputed on the ground that he was a partner when they were given;

*TO ALL TO WHOM THESE PRESENTS SHALL COME, I, [*arbitrator*], of Lincoln's Inn, Barrister at Law, *send greeting*. WHEREAS by a certain deed, bearing date on or about the —— day of March, 18—, and made between [A. B.], of &c., of the first part; [*five trustees*], of &c., trustees on behalf of themselves and the other creditors of the said [A. B.], of the second part; the several persons whose names are thereunto subscribed, and seals affixed, being creditors of the said [A. B.], of the third part; and [M. N.], of &c., of the fourth part; it is, among other things, contained as follows: that is to say (*a*); *Whereas* the said [M. N.] claims, that the said partnership concern of [N. O.], [O. P.], and [A. B.], is indebted to him in the sum of 500*l.* or some other sum or sums of money secured to him by the bond of the said [N. O.], [O. P.], and [A. B.], some or one of them, or by some other security or securities; but it is contended on the part of the said trustees, and other the creditors of the said [A. B.], parties hereto of the second and third part, that he

(*a*) It is not uncommon to set forth the submission *verbatim*: sometimes it is the most simple and easy mode: but, whenever the submission is unskilfully drawn, it is the most prudent course.

Sometimes the submission is stated *verbatim*.

A CREDITOR NOT A PARTNER WHEN SECURITIES WERE GIVEN.

the said [M. N.] is not entitled to recover any part of the said debt or sum from the said partnership concern, until all the creditors of the said concern are paid off and satisfied their full and whole debts of twenty shillings in the pound; inasmuch as it appears to them, that the said [M. N.], at the time such security or securities were so given to him as aforesaid, was a partner in the said concern of [N. O.], [O. P.], and [A. B.], and still remains a partner therein, so far as respects the creditors of the said concern. *Now*, in order to settle such differences and disputes, it is hereby covenanted, declared, and agreed, by and between all and every the said parties hereto, and particularly the said [M. N.], for himself, his executors, and administrators, doth covenant and agree to and with the said [*trustees*], as trustees as aforesaid, that the said matters in difference between them shall be left to the award, order, and determination of [*arbitrator*], barrister at law; who shall award and *determine whether the said [M. N.] was or was not a partner in the said concern of [N. O.], [O. P.], and [A. B.], at the time the said security or securities was or were given to him by them as aforesaid; and whether he does or does not still remain a partner therein, with respect to the other creditors of the said concern; and whether he is or is not entitled in law (*b*) to recover on the said security or securities before all the other creditors of the said concern have been paid their full and whole debts of twenty shillings in the pound: *and* in case it shall be awarded that he the said [M. N.] is entitled so to recover on such security or securities, then he shall be entitled to receive the benefit and provisions of this deed equally with the other creditors of the said [A. B.]: *But* in case it shall be awarded that he is a partner in the said concern of [N. O.], [O. P.], and [A. B.], or that he was so at the time of taking such security or securities as aforesaid, then he the said [M. N.], his heirs, executors, and administrators, shall and will, whenever thereunto required by the trustees before-named, grant, convey, assign, and assure, by such conveyances, assignments, or other assurances as they shall require, unto

that the matters in difference shall be referred to an arbitrator, who shall determine whether the creditor was or was not a partner when the securities for the debt were given, &c.:

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but if it should be awarded, that he is a partner, or was so when the securities were given, then he shall, when required, convey to trustees all his interest, in trust for the other creditors:

(*b*) As to the submission of a point of law, to the determination of an arbitrator, *vide ante*, p. 77, n. (*b*).

A CREDITOR NOT A PARTNER WHEN SECURITIES WERE GIVEN.

them the said trustees, their heirs, executors, administrators, and assigns, all his interest in the said partnership estate, stock, and effects; and in all other the hereditaments and premises hereby covenanted to be assigned and conveyed; to be held by them upon the trusts hereinbefore declared, to and for the benefit of all other the creditors of the said [A. B.]: *And moreover*, that all and every the parties hereto shall and will stand to, abide by, and perform the award and determination of the said [*arbitrator*] in the matters aforesaid; *so as* the same be made in writing, and ready to be delivered to the parties in difference within three months from the day of the date hereof, or as soon after as they shall respectively require the same. Now KNOW YE, *That* I, the said [*arbitrator*], having taken upon myself the burthen of the said reference, and having heard and duly considered the allegations, vouchers, proofs, and witnesses of the said parties; and the said *parties not having hitherto required my award, do make this my award in writing, ready to be delivered to the said parties as soon as they shall require the same of and concerning the premises to me referred, as follows: that is to say; I *do* award and determine, that the said [M. N.] was not a partner in the said concern of [N. O.], [O. P.], and [A. B.] at the time the said security or securities, or any of them, were given to him by them as aforesaid, nor does still remain a partner therein, with respect to the other creditors of the said concern: AND that he the said [M. N.] is entitled in law to recover on the said security or securities, before (and without waiting until) all the other creditors of the said concern shall have been paid their full and whole debts of twenty shillings in the pound. IN WITNESS, &c.

agreement to abide by award, if made within three months, or as soon after as required.

Testatum.

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Award that the creditor was not a partner when the securities were given; nor does still remain a partner with respect to the other creditors: and that he is entitled in law to recover on the securities, before the other creditors are fully paid.

DISSOLUTION OF COPARTNERSHIP.

AWARD *that a* PARTNERSHIP *be* DISSOLVED (*a*): *that A. B. shall receive to his own use, without C. D.'s interference, all the Partnership Debts; and may use C. D.'s Name in any Action or Suit for Recovery thereof: that A. B. shall pay all Demands on the Copartnership; and indemnify C. D. therefrom, and from all Damages by reason of his Name being used: that C. D. shall, on A. B.'s request, deliver to him all Books, &c. in C. D.'s custody, relating to the Copartnership: and that A. B. shall pay, and C. D. accept, a certain Sum in full of all Demands.*

[*96] * NOW KNOW YE, *That* I the said [*arbitrator*], having, &c., do make this my award of and concerning the matters so referred to me as aforesaid, in manner following: that is to say; FIRST, I do award, order, and adjudge, that the said partnership shall be deemed and taken to have ended

Award

that partnership be dissolved:

On a reference of all matters in difference between partners, the arbitrator may award a dissolution.

So, if it be between a master and apprentice, the arbitrator may award the indentures to be delivered up.

(*a*) On a dispute between two partners, all matters in difference were referred to arbitration in the common form. The arbitrator, among other things, directed the partnership to be dissolved. On a motion to set aside the award, it was objected, that the arbitrator had exceeded his power. But the Court held, that "when all matters in difference were referred, he had clearly a power to dissolve it. If a difference between a master and apprentice were referred, the arbitrator would have a power to order the indentures to be delivered up. And it being sworn, that, at the trial, after the juror was withdrawn, and the rule of reference was thus generally drawn up, the plaintiff openly declared, he would not have it understood that the arbitrator had a power to dissolve the partnership; Lord *Mansfield*, C. J., observed, that is sufficient evidence out of his own mouth, that the dissolution of the partnership was then a matter in difference." *Green* v. *Waring*, 1 Wm. Bla. 475; and see 1 Roll. Abr. 242, (B), pl. 2; 3 Vin. Abr. 42.

and been determined on and from the first day of November 18—. SECONDLY, I do award, order, and direct, that the said [A. B.], his executors or administrators, shall and may demand, have, and receive to his or their own use, without the interference of the said [C. D.], all debts due and owing to the said copartnership, from any person whomsoever: *And* shall and may use the name of the said [C. D.], in any action or suit to be commenced for the recovery of any such debt or demand. THIRDLY, I do award, order, and direct, that the said [A. B.], his executors or administrators, shall and do bear, pay, and discharge all debts, demands, damages, and claims whatsoever, due or owing by, or which any person hath or can make against the said copartnership, or the said [C. D.], in respect thereof: *And* shall and do indemnify and keep harmless the said [C. D.] from and against all such debts, demands, damages, and claims; and from and against any loss or damage that may be incurred or sustained by the said [C. D.], by reason of his name being used in any such action or suit so to be commenced as aforesaid, in pursuance of the authority hereby given to the said [A. B.], his executors and administrators. FOURTHLY, I do award, order, and direct, that the said [C. D.] shall and do, at any * time or times, upon the request of the said [A. B.], his executors or administrators, deliver up to the said [A. B.], his executors or administrators, all and every the books, papers, and writings which may be in the custody, power, or possession of him the said [C. D.], in any wise relating to or concerning the business of the said copartnership. FIFTHLY, I do award, order, and direct, that the said [A. B.] shall and do, on the —— day of —— next, at the house of the said [C. D.], at —— aforesaid, pay unto the said [C. D.], his executors or administrators, the sum of —— pounds: *And* that the said [C. D.] shall and do accept and receive the same sum, in full satisfaction and discharge of all demands against the said [A. B.], until the day of the date of the said submission.

DISSOLUTION OF COPARTNERSHIP.

that A. B. shall receive to his own use, without C. D.'s interference, all the partnership debts;

and may use C. D.'s name in any action or suit for recovery thereof:

that A. B. shall pay all demands on the copartnership;

and indemnify C. D. therefrom:

and from all damages by reason of his name being used:

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that C. D. shall, on A. B.'s request, deliver to him all books, &c. in C. D.'s custody relating to the copartnership:

and that A. B. shall pay, and C. D. accept, a certain sum in full of all demands.

ON APPEALS AGAINST POOR RATES.

AWARD *on an Agreement between an Appellant's Solicitor and the Solicitor for a Parish, that two Appeals* (*a*) *to the Quarter Sessions against two* POOR RATES, *and the* RENTAL *upon which the Premises was to be rated, should be referred to an Arbitrator, and who had under a Power enlarged the Time for making his Award,—That the first Rate was a fair Rate; that the Tenant was not thereby rated at a greater Sum than he ought to have been rated at; and that he was not aggrieved thereby: the same as to the second Rate: that there is now owing on both Rates a certain Sum: that the Tenant shall pay the same on* * *a certain Day: that the Premises are of a certain Annual Value; and ought to be rated upon that Sum.*

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TO ALL TO WHOM THESE PRESENTS SHALL COME, I [*arbitrator*], of &c., *send greeting*. WHEREAS by a certain rate or assessment, made on the —— day of —— last, by the churchwardens and overseers of the poor of the parish of ——, in the county of ——, for the necessary relief of the poor of the same parish, for six months, commencing from the feast day of Easter, in the year of our Lord 18—, and which said rate was afterwards duly allowed by two of his Majesty's justices of the peace for the said county, [*tenant*], of the said parish of ——, farmer, was rated and assessed for the messuage, farm, and lands in his occupation in the said parish, with the appurte-

Recital of the making and confirmation of a poor rate:

Poor rate appeal may be referred to arbitration.

(*a*) An appeal at sessions against a poor rate may, with the consent of the parties interested, be referred by the justices to arbitration. *Rex* v. *Justices of Northampton*, Caldecott, 30. 1 Gwill. Bac. Abr. 203.

ON APPEALS AGAINST POOR RATES.

nances, in the sum of (seventy-five) pounds: *And* the said [*tenant*], conceiving himself aggrieved by the said rate, afterwards, at the General Quarter Sessions of the Peace, holden for the said county on the —— day of ——, 18—, appealed against the said rate, alleging, that he was assessed in respect of the said premises at a greater sum than, according to the fair, just, and proportionate value of the same premises, he ought to have been rated and assessed at. And whereas, by a certain other rate or assessment, made on the said —— day of ——, by the churchwardens and overseers of the poor of the said parish, for the necessary relief of the said poor, for six months, commencing from the feast day of Saint Michael, in the year of our Lord 18—, and which said last mentioned rate was afterwards duly allowed by two of his Majesty's justices of the peace for the said county, the said [*tenant*] was also rated and assessed for the said premises, with the appurtenances, in the like sum of (seventy-five) pounds: *And* the said [*tenant*], conceiving himself aggrieved by the said last mentioned rate, appealed against the same at the said General Quarter Sessions of the Peace, holden as aforesaid, alleging, amongst other things, that he was assessed in respect of the said premises at a much greater sum than, according to the fair, just, and proportionate value of the same premises, he ought to have been rated and assessed* at. And whereas at the [*99] General Quarter Sessions of the Peace, holden in and for the said county of ——, on the —— day of —— last, the said several appeals were in the course of being duly heard and determined: but, on the motion of the counsel for the said [*tenant*], and by the consent of the counsel for the said churchwardens and overseers of the poor, the hearing of the said several appeals was respited until the then next General Quarter Sessions of the Peace for the said county. And whereas by a certain agreement, bearing date the —— day of —— last, under the hands of [*attorney*] (*b*), as solicitor for the said [*tenant*], and

and appeal against the same at the sessions.

Recital of the making and confirmation of another poor rate on the same premises:

and appeal against the same at the sessions.

Recital that the appeals were in the course of being heard, but the hearing was respited.

Recital of agreement between appellant's solicitor and the

(*b*) It is generally prudent to have an express authority. But the assent of the attorney in a cause to a reference, by a rule of *nisi prius*, will bind the client; for, the employing an attorney in a particular suit,

The assent of the attorney in a cause to a reference, by a

ON APPEALS AGAINST POOR RATES.

solicitor for the parish, that the appeals, and the rental upon which the premises was to be rated, should be referred to arbitrator; so as he made his award in a given time; with power to enlarge the time, not beyond a given day.

[*attorney*], as vestry clerk and solicitor for the said parish, the said solicitors being duly authorized for that purpose, did thereby agree, on the part of their respective clients, that the said appeals, and also the said question as to the rental or sum upon which the said messuage, farm, and lands, was to be rated to the poor's rates, should be referred to the award of me the said [*arbitrator*]; *so as* I should make my award or awards in writing on or before the (fourteenth) day of (February) then next: *With* power for me to enlarge the time for making my awards from time to time, as I should think necessary, to any period not extending beyond the (first) day of (June) then next.

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rule of *nisi prius*, will bind the client; and it seems to be the same in a civil cause at the quarter sessions.

implies the client's assent that he may do every thing which the Court may approve in the progress of the cause. Kyd on Awards, 45, 2d ed. And it seems, the same principle equally applies to a reference by the attorney of an appellant or respondent, at the quarter sessions.

The Court will not set aside an order of *nisi prius*, referring a cause to arbitration, on an affidavit by the defendant, that he desired his attorney not to refer.

After an order of reference has been made, with the consent of counsel and attorney, the Court will not set it aside on an affidavit by a party, stating, that he had expressly desired his attorney not to consent to any rule of reference, though the application be made before any step is taken by the arbitrator, excepting the appointment of a distant day for a meeting, in order to afford time for application to the Court to set the rule aside. The defendant's remedy is by action against his attorney. There would be no end to these applications, if the Court were to interfere; as such interference would lead to collusion; for, whenever a party did not like the prospect of the reference, he would say, that he had never given his attorney authority to refer. *Filme* v. *Delber*, 3 Taunt. 486. And in a subsequent case, the Court of Common Pleas again refused to set aside an order of *nisi prius*, referring a cause to arbitration, on an affidavit by the defendant, that she desired her attorney not to refer. 1 Chit. Rep. 193 (*a*).

Under an order of reference an attorney may extend the time for making an award.

So, under an order of reference, an attorney may extend the time for making an award. Thus, where the defendants, in an extent in aid, withdrew their plea, and suffered judgment to be entered up on an agreement, and order of reference thereon, to submit to arbitration the question of the amount of what was due to the prosecutor, provided the award should be made by a given time, and the arbitrator did not make his award till after the expiration of a further period, to which it had been agreed to extend the time, in consequence of the defendant's having delayed to furnish him with the name of a trustee, which was required to make part of the award, and the defendant's solicitor *after-*

ON APPEALS AGAINST POOR RATES.

AND WHEREAS I the said [*arbitrator*], the arbitrator, in pursuance of the power to me given in and by the said agreement, did, on the (thirteenth) day of (February) last, by writing under my hand, duly enlarge the time for the making of my award between the said parties until the (thirty-first) day of (May) next; *As* by the said several assessments, appeals, agreement, and enlargement, reference being thereto respectively had, will more fully and at large appear. NOW KNOW YE, *That* I the said arbitrator, having taken upon myself the burthen of the said arbitration, and having fully heard, and maturely considered all the evidence produced before me by each of the said parties touching and relating to the matters in difference between them so referred to me as aforesaid, do make this my award in writing of and concerning the matters so to me referred as aforesaid, in manner following: that is to say; As to the first mentioned rate or assessment, I do award, that the same was and is a just, fair, and equal rate and assessment upon, for, and in respect of the said messuage, farm, and lands, with the appurtenances: *And* that the said [*tenant*] was not, nor is, in or by that rate or assessment, rated or assessed in respect of the said premises, at a greater sum than, accord-

Recital of arbitrator having enlarged the time for making his award.

Testatum.

Award that the first rate was a fair rate;

that the tenant was not thereby rated at a greater sum than he ought;

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wards wrote a letter to the arbitrator, urging him to re-consider the subject of his allowances, which was refused, as the reference was considered to be closed;—it was held by the Court, that, under those circumstances, the delay in making the award had not invalidated it, as being made after the expiration of the arbitrator's authority; and therefore they refused to set aside the judgment, and the proceedings thereon, *and the award,* and allow the defendants to plead to the extent. Lord Chief Baron Richards said, the judgment and the award must be taken together, or the judgment would not be regular. The question therefore is, whether this is a good award, or not. It is said it is not, because not made in time; that is, not by the first of September. It certainly was not, in fact, and therefore *primâ facie* it could not be good, unless, by the conduct of the parties, they have made it effectual by giving it their assent. I think it is quite clear that they have done so in this instance, under the circumstances of the case. Besides the other conduct of the defendants, all of which speaks a full assent to all that had taken place, there is the letter of their solicitor, written seven days after the 1st of September, requiring fur-

ON APPEALS AGAINST POOR RATES.

ing to the fair, just, and proportionate value of the same in the said parish, he ought to have been rated and assessed at: *And* that he was not, nor is, in any manner aggrieved by that rate or assessment. And, as to the last above recited rate or assessment, I do award, that the same was and is a just, fair, and equal rate and assessment upon, for, and in respect of the said messuage, farm, and lands, with the appurtenances: *And* that the said [*tenant*] was not nor is, in or by that rate or assessment, rated or assessed in respect of the said premises, at a greater sum than, according to the fair, just, and proportionate value of the same in the said parish, he ought to have been rated and assessed at: *And* that he was not, nor is in any manner aggrieved by that rate. And I do therefore award, that the churchwardens and overseers of the poor of the said parish shall and do, at the General Quarter Session of the Peace for the said county, which shall be holden next after the making and publishing of this my award, move the court there to confirm and allow each of the said rates, so appealed against as aforesaid, as to the said messuage, farm, and lands, with the appurtenances; and to dismiss the said appeals. And I do further find and award, that there is now justly due and owing to the said churchwar-

and that he was not aggrieved thereby: that the second rate was a fair rate;

that the tenant was not thereby rated at a greater sum than he ought;

and that he was not aggrieved thereby: that a motion shall be made at the next quarter sessions, to confirm rates, and dismiss appeals:

that there is now owing on

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ther matters to be still considered by the arbitrator, which he refuses to do. It is impossible not to hold that letter to be an assent to the enlargement of the time, as it was written with a view to the award which the arbitrator *was* to make. Mr. Baron *Graham*, concurring, said, this would be an exceedingly clear case in my view of it, if it had stood upon the letter of the defendant's solicitor alone, for that was an express recognition and assent, applying to all that had then taken place; and no subsequent verbal dissent could destroy the effect of that letter. They were of course aware of all that had been then done before the arbitrator, and that they had no new evidence to produce. Beyond all doubt, this amounted to an express consent to enlarge the time. And Mr. Baron *Garrow* said, I consider the letter an authority to the arbitrator, equal even to a rule of Court. *The King* v. *Hill*, 7 Price, 644. Therefore, under an order of reference, although the time for making an award has expired, the authority of the arbitrator may be revived by an unstamped instrument. As to the general doctrine respecting the enlargement of the time for making an award, *vide ante*, Vol. 2, p. 631—637.

Letter sent to the arbitrator by defendant's attorney, at the request of his client, urging him to reconsider the subject of his allowances, amounts to an express consent to enlarge the time, equal even to a rule of Court.

ON APPEALS AGAINST POOR RATES.

dens and overseers of the poor of the said parish, for and on account of the said two several rates, the sum of 150*l.* AND I do further award, order, and direct, that the said [*tenant*] shall and do, on the (twenty-eighth) day of March instant, between the hours of ten o'clock in the forenoon and twelve o'clock at noon, at and in the vestry-room of the said parish, pay or cause to be paid the said sum of 150*l.*, for and on account of the said parish, to the then churchwardens and overseers of the poor of the said parish, or to some or one of them, or to such other person as they shall or may legally authorize to receive the same. AND as to the rental or sum upon or at which the said messuage, farm, and lands should in future be rated, for and towards the relief of the poor of the said parish, I do find and award, that the said messuage, farm, and lands, with the appurtenances, at the times of the making and allowing the said several rates as aforesaid, were and now are of the

both rates, a certain sum: that tenant shall pay same on a certain day:

that premises are of a certain annual value;

It seems that the assent of a solicitor to a reference by rule of a Court of equity, is obligatory on the client, without his concurrence; but it was formerly held otherwise.

The assent of a solicitor to a reference by rule of a Court of equity, it has been holden, is not obligatory upon the client, without his actual concurrence; though in the same case it is admitted, that such a reference by rule of *nisi prius*, will bind the client. *Colwall* or *Colwell* v. *Child*, 1 Cha. Rep. (104), 195, edit. 1693; 1 Cha. Cas. 86, *S. C.* But the authority of this case may now be doubted; 1 Gwill. Bac. Abr. 208, (*a*); for the character of a solicitor is equally known to the law as that of an attorney: their duty and their privileges are the same; the confidence reposed in them the same; they only differ in name, and practise in different Courts.

But must be specially averred where some of the parties are infants.

[It was held in a late case, that where an action was brought for the recovery of a sum awarded to the plaintiff, under a reference made by an order of the Vice Chancellor, it was not sufficient to allege that the reference was made with the consent of the attornies of the parties in the suit, *inasmuch as some of the parties were infants* who could not be bound, and it was not to be presumed that their next friends, by whom they were represented, intended to make themselves personally responsible for the infants' concurrence when of age. If this were the case it ought to have been specially averred and shewn. The agreement for the reference therefore not being obligatory on all the parties, an action could not be sustained, the submission not being mutual. *Biddell* v. *Dowse*, 6 Barn. & Cress. 255; reversing judgment in C. B. *Dowse* v. *Coxe*, 10 J. B. Moore, 272. In this case the Lord Chief Justice expressly intimated his wish not to be understood as admitting that the consent of the attornies was sufficient even as to the *adult* parties.]

ON APPEALS AGAINST POOR RATES.

full annual value of 1500*l.*: *And* that the said premises should and ought to be rated and assessed for and towards the relief of the poor of the said parish, upon, at, after, and according to that sum; the same being, in my judgment, at this time, *the fair, just, and reasonable annual value of the said premises. As WITNESS my hand this —— day of —— 18—.

and ought to be rated upon that sum.

[*103]

Testimonium.

Attestation.

SIGNED, AND PUBLISHED, by the above-named [*arbitrator*], as his award, (being first duly stamped (*d*), in the presence of us,

Stamp.

(*d*) *Vide ante*, p. 4, n. (*d*).

[104]

AS TO CHURCH RATES.

AWARD *that a certain Sum is due for* CHURCH RATES: *that the Amount shall be paid on a certain Day: that the Premises are of a certain Annual Value; and ought to be rated to the Church Rate upon that Sum.*

Award that a certain sum is due for church rates;

NOW KNOW YE, that I the said [*arbitrator*], having &c. *ut ante*, p. 100, I do award, that there is justly due and owing from the said [*tenant*], for and in respect of the said messuage, farm, and lands, with the appurtenances, to the churchwardens and parishioners of the said parish, for and in respect of the church-rates of the said parish, the sum of —— pounds: that is to say; from Christmas 18—, to Christmas 18—.

that the amount shall be paid on a certain day;

AND I do therefore award, that the said [*tenant*], shall and do, on the —— day of —— now next, at and in the vestry room of the said parish, pay, or cause to be paid, the said sum of —— pounds, for and on account of the said parish, to the said churchwardens of the said parish, or to some or one of them, or to such other person as they shall or may legally authorize to receive the

same. AND as to the rental, or sum upon or at which the said messuage, farm, and lands, with the appurtenances, should in future be rated for and towards the rate, commonly called the church-rate, of the said parish, I do find and award, that the said messuage, farm, and lands, with the appurtenances, are of the full annual value of —— pounds: *And* that the said premises should and ought to be rated and assessed towards the said rate, upon, after, and according to that sum; the same being, in my judgment, at this time, the fair, just, and reasonable annual value of the said premises.

AS TO CHURCH RATES.

that the premises are of a certain annual value;

and ought to be rated to the church rate upon that sum.

[105]

AWARD *under a* RULE *of the Court of King's Bench, whereby it was ordered, that all Matters in difference between a Plaintiff and Defendant, should be referred to Two Arbitrators, and such third Person as they should appoint, so as the Arbitrators, or any Two of them, made their Award on or before a certain Day, or on or before such extended Day as they should appoint, and the Court, or a Judge, order, and where the Time had been accordingly enlarged;* THAT *the Defendant shall pay the Plaintiff a certain Sum, which the Arbitrators find to be due: and that the Plaintiff shall pay the Costs of Reference.*

OF PAYMENT UNDER RULE OF COURT.

TO ALL TO WHOM THESE PRESENTS SHALL COME, *We* [*three arbitrators*], of &c., *send greeting.* WHEREAS by a rule of his Majesty's Court of King's Bench, at Westminster, made on —— next after ——, in the —— year of the reign of King George the Fourth, in a cause then depending in the said Court, wherein [*plaintiff*] was plaintiff, and [*defendant*] was defendant; after reciting as therein was recited, *It was ordered,* upon hearing

Recital of a rule of the Court of King's Bench, whereby it was ordered that all matters in difference between a plaintiff and defendant should be

OF PAYMENT UNDER RULE OF COURT.

referred to two arbitrators, and such third person as they should appoint;

[*106]

so as the arbitrators, or any two of them, made their award on or before a certain day, or on or before such extended day as they should appoint, and the Court, or a judge order: that the parties should perform the award: and that the costs of the cause and refer-

counsel for the plaintiff and defendant, that all matters in difference between the said parties should be referred to the award, order, arbitrament, final end, and determination of us [*two arbitrators*], and of such third person as we should by memorandum under our hands, to be indorsed on the said rule, before we proceeded on the said arbitration, nominate and appoint, or of any two of us: *So as* we, the said arbitrators, or any two of us, should make our award in writing of and concerning the premises in question, on or before the —— day of —— then next, or on or before such further or ulterior day as we the said arbitrators, or any two of us, should ultimately *appoint and signify in writing under our hands, to be indorsed on the said rule, and the said Court, or one of the judges thereof should order (*a*): *And* that the said parties should perform, fulfil, and keep such award, so to be made by us the said arbitrators, or any two of us: *And it was further ordered*, by and with such consent as aforesaid, that the costs of the said cause, and of the said reference, or in any manner relative thereto, should abide the event (*b*) of the

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If an enlargement be made before the time limited, the Court, or a judge, may assent afterwards: but it seems otherwise where an order is requisite.

(*a*) If the *approbation* of a Court or a judge be requisite, and the arbitrators enlarge previous to the time limited, the subsequent assent of the Court or judge is sufficient; but it is otherwise, if the arbitrators enlarge after the time limited. *Vide ante*, Vol. 2, p. 632, n. (*b*). But under such a reference as the above, it seems that the order of the Court or judge should be made before the expiration of the time limited.

When a cause is referred, and the costs are directed to abide *the event*, it means the *legal event*, and the party in whose favour the award is made, will be entitled to no more costs than if he had obtained a verdict to the same effect.

(*b*) When a cause has been referred by an order of *nisi prius*, or rule of Court, and the costs are directed to abide *the event* of the award, that must be taken to mean the *legal event*; and the party in whose favour the award is made will be entitled to no more costs than if, the cause having proceeded to trial, he had obtained a verdict to the same effect as the award. Therefore, where a cause was referred by order of *nisi prius*, and the costs were to abide the event, the parties on one side were executors, and it was awarded that nothing was due from the other party to them, the Master taxed that party his costs; but the Court held, that the executors were not liable, since persons in that capacity would not have been liable to pay costs had a verdict passed against them, or had they been nonsuited. If they were, no executor would consent to a reference, as he would, in such case, be in a worse situation than if a verdict had been given against him. *Highman* and another, executors, v. *Hassel*, cited 3 Durnf. & East, 139. So, where the costs were directed to abide the event of the award,

said award or umpirage. And whereas we the said [*two arbitrators*], by virtue of the authority given us by the said in part recited rule, did nominate and appoint the said [*third arbitrator*], to act with us in the said reference, before we proceeded on the same (*c*). And whereas the time limited for making our said award has been duly enlarged until (*d*) the —— day of —— instant: Now

ence should abide the event of the award.

Recital of appointment of third arbitrator.

Recital of due enlargement of time.

Testatum.

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and the arbitrator found no damages for the plaintiff, in an action of trespass to land, and directed both parties to pay their own costs, it was held that the plaintiff was not entitled to costs, because the legal event of the reference would not carry them. *Willis* v. *Osborne*, 1 Chit. Rep. 183. So, where an action of trespass was brought for pulling down the plaintiff's gates, and assaulting him, and the defendants justified to all the counts except one, under different rights of way, and pleaded not guilty to the whole; and, under a rule of *nisi prius*, the arbitrator awarded a right of way to the defendants different from any of those pleaded by them, and found *five shillings* damages to the plaintiff for the assault, as having been committed when the defendants were attempting to exercise a right of way negatived by the arbitrator; the Court held, that the plaintiff can recover no more costs than damages; for the arbitrator's award is not tantamount to a judge's certificate, under the 22 & 23 Car. 2, c. 9. *Swinglehurst* v. *Altham* and another, 3 Durnf. & East, 138. Therefore, where a verdict was taken for ten pounds in trespass, subject to an award of damages, and the costs were directed to abide the event, if the arbitrator find less than forty shillings damages, the plaintiff cannot have his costs, though it be also found that the trespass was wilful, and that the defendant should pay the plaintiff his costs: for costs being directed to abide the event, means the legal event; and the authority of a judge to certify for costs, under the 22 & 23 Car. 2, c. 9, where the trespass is wilful, is not transferred to the arbitrator, under such a rule of reference. *Ward* v. *Mallinder*, 5 East, 489; and see 1 Chit. Rep. 185.

Where by a rule of reference the costs are directed to abide the event, an award is not tantamount to a judge's certificate for costs, under the 22 & 23 Car. 2, c. 9. where the trespass is wilful.

But where the verdict was taken at the trial for a nominal sum, subject to an order of reference for ascertaining the amount of the damages, by which the costs were directed to abide *the event* of the award, and the arbitrator found a less sum to be due to the plaintiff than that for which the defendant was arrested; the Court held, that the sum so found, and for which judgment was afterwards given, was to be considered as a sum *recovered*, within the meaning of the act 43 Geo. 3, c. 46, s. 3, (for pre-

But under 43 Geo. 3, c. 46, s. 3, for prevention of frivolous and vexatious arrests and suits, if the costs are directed to abide the event, and the arbitrator

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(*c*) See the form, *ante*, Vol. 2, p. 593.

(*d*) "Until" is, of itself, for this purpose, inclusive. *Vide ante*, Vol. 2, p. 632, n. (*c*).

"Until."

OF PAYMENT UNDER RULE OF COURT.

KNOW YE, that we the said [*three arbitrators*], in pursuance of the said rule and reference, having heard the said parties by themselves and their attornies, their allegations and answers, touching and relating to the matters in [*108] difference between them, examined their * witnesses upon oath, and maturely considered thereon, do award, order, adjudge, find, and determine of and upon the

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find a less sum to be due than that for which the defendant was arrested, it is a sum *recovered*, within the act; but it is otherwise if the costs are not directed to abide the event.

vention of frivolous and vexatious arrests and suits), so as to entitle the defendant to apply for costs. *Neale* v. *Porter*, and *Burns* v. *Palmer*, 2 Tidd's Prac. 998, 7th ed. [But in order to bring a case within the statute a verdict must be taken, on which judgment may be entered up. *Keene* v. *Deeble*, 3 Barn. & Cress. 491. In a late case, where a reference was made in a cause in which the plaintiff had arrested the defendant for 179*l.* and one of the terms of the reference was, that *the costs of the cause should abide the event of the award*, and the arbitrator by his award found, that, at the commencement of the suit, there was due from the defendant to the plaintiff the sum of 45*l.* 10*s.* and that the plaintiff had no reasonable or probable cause for arresting the defendant for 179*l.*; and that the defendant by reason thereof was entitled to compensation or damages to the amount of 20*l.*, and the arbitrator then ordered the verdict to be finally entered for the plaintiff for 25*l.* 18*s.*, the balance due to him after deducting therefrom the damages awarded to the defendant; the Court refused to allow the defendant costs under the statute (43 Geo. 3, c. 46), "the event" of the award being in favour of the plaintiff. *Thompson* v. *Atkinson*, 6 B. & C. 193.] In *Silversides* v. *Bowley*, 1 Moore, 92, and *Payne* v. *Acton*, 1 Brod. & Bing. 278, the costs were not directed to abide the event of the award, which is the reason why the defendants applied for costs, on the ground of the arrests being vexatious and malicious.

If a cause be referred, the costs to abide the event, and the arbitrators award that the plaintiff's original demand was under 40*s.* he is not entitled to costs; but, on a suggestion, the defendant is.

Where a cause was referred to arbitration by rule of *nisi prius*, and the costs were to abide the event of the award, and the arbitrators awarded that the plaintiff's original demand was only thirty-seven shillings: the Court held, that the plaintiff was not entitled to costs, any more than he would have been if, on a trial, he had recovered under forty shillings; but that, on a suggestion to be entered by leave of the Court, the defendant would be entitled to costs: *Butler* v. *Grubb*, cited 3 Durnf. & East, 139: for it appeared by the award, that the plaintiff's demand was originally under forty shillings, and he might have recovered it in a Court of conscience. *Watson* v. *Gibson*, and *Harrison* v. *Slater*, 2 Tidd's Prac. 862, 7th ed.

If a cause be referred, the costs to abide the event, and the

But where a cause is referred to arbitration, and the costs are to abide the event, and the arbitrator awards something to be done, which proves that the event in fact is in favour of the plaintiff, he is entitled to costs: although

premises in manner following: that is to say; *We* do award and order that the said [*defendant*] shall and do pay to the said [*plaintiff*], at the house of Mr. ——, attorney at law, in ——, between the hours of —— and —— of the clock, in the —— noon of the —— day of this present month of ——, the sum of —— pounds of lawful money of Great Britain, which we find to be due

OF PAYMENT UNDER RULE OF COURT.

Award that dedendant shall pay plaintiff a certain sum, which arbitrators find to be due:

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the arbitrator do not award a verdict to be entered for him. Thus, where an action of trover for corn, &c., having been referred to arbitration, with a proviso that the costs should abide the event; and the arbitrator awarded to the plaintiff a right of going into a certain barn to thresh his corn there, and directed that the incoming tenant should prepare the barns for the outgoing tenant, the plaintiff, and permit him to thresh his corn there, but omitted to give the plaintiff his costs, and directed a verdict to be entered for him, the Court held that the plaintiff was entitled to his costs, they being to abide the event of the award, not of the action. *Anon.* 1 Smith's Rep. 426.

arbitrator award something to be done, which proves that the event in fact is in favour of the plaintiff, he is entitled to costs.

As the statute 11 Geo. 2, c. 19, s. 22, gives double costs against a plaintiff in replevin only in three cases, namely, where he is nonsuit, discontinues his action, or has judgment given against him; therefore, where, in replevin, the cause not being then at issue, the parties agreed by bond to submit the question to arbitration, the costs to abide the event of the reference, and he awarded in favour of the defendant; it was held, that, he was not entitled to double costs under the statute; for the plaintiff had neither become nonsuit, nor discontinued his action, nor had judgment given against him. However, if the arbitrator had awarded a discontinuance, it would have been different; but that not being the case, the defendant is only entitled to single costs. *Gurney* v. *Buller*, 1 Barn. & Ald. 670.

If a replevin cause be referred, the costs to abide the event, and the arbitrator award in favour of the defendant, he is not entitled to double costs, under 11 Geo. 2, c. 19, s. 22; otherwise, if a discontinuance had been awarded.

An arbitrator, under a rule of reference, which directs that the costs of the cause shall abide the event, has no power to direct those costs to be set off against the costs in a prior cause, although all matters in difference are referred. But the award is not to be set aside entirely, but only for that part which is incorrect. *Hunsted* v. *Kidd*, 1 Chit. Rep. 526. *Vide ante*, p. 14.

If a cause be referred, the costs to abide the event, the arbitrator cannot direct those costs to be set off against costs in a prior cause.

If a cause be referred to arbitration, under an order of *nisi prius*, but a verdict be nevertheless taken for the plaintiff for a certain sum, as a security for what shall be awarded to be paid to him, *and costs*, the arbitrator cannot award a sum to be paid to the plaintiff *without costs*; because, by the terms of the order, he was precluded from entering at all into the question concerning costs. Sayer's Law of Costs, 177. And where, by the rule of reference, the costs are to abide the event of the award, that includes the costs of the reference, as well as of the cause. *Wood* v. *O'Kelly*,

If a cause be referred, and a verdict for a sum as a security for debt *and costs*, the arbitrator cannot award a sum to the plaintiff *without costs*.

If by the rule

OF PAYMENT UNDER RULE OF COURT

and that plaintiff shall pay costs of reference.

and owing to the said [*plaintiff*], on a settlement of all accounts, dealings, and transactions between him and the said [*defendant*], and so referred to us as aforesaid. And we do also award and order, that the said [*plaintiff*] shall and do pay unto Mr. ——, of ——, upon the delivery of this our award, the sum of —— pounds, for the costs of us the said arbitrators in the said reference, the drawing
[*110] of our award, and the stamps used for the same. *In witness whereof, we have hereunto respectively set our hands, the —— day of ——, 18—.

Signed and published, (being first duly stamped (*d*),) in the presence of

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the costs are to abide the event, it includes both the costs of reference and of the cause.

9 East, 436. But see *Bracher* v. *Cotton*, Barnes, 123; Pr. Reg. *S. C. semb. contra.* In that case, however, it does not appear that the costs were expressly directed to abide the event of the award. 2 Tidd's Prac. 863. [Even where the costs of a cause are not expressly to abide the event of the award, yet, if the arbitrator direct a verdict to be entered, which would carry costs (as for 40*s.* damages) in an action of trespass, the party in whose favour the verdict is to be entered, will be entitled to costs as consequent thereon, without any express direction. *Young* v. *Gye*, 10 J. B. Moore, 198. See also *Mackintosh* v. *Blyth*, 1 Bing. 269]. See further as to costs, *ante*, p. 10, n. (*c*); *post*, p. 133, n. (*a*).

Stamp.

(*d*) *Vide ante* p. 4, n. (*d*).

UNDER A RULE OF COURT; PAYMENT OF MONEY, AND COLLECTION OF PARTNERSHIP DEBTS.

AWARD *by Three Arbitrators, under a Submission by a* Rule *of the* Court *of* King's Bench, *in an Action brought by one Co-partner against another, the Rule ordering that the Costs of the Cause should abide the Event of the Award, and that the Costs of the Reference should be in the Discretion of the Arbitrators;*—That *all Proceedings in the Cause shall cease: that the Defendant shall pay the*

UNDER A RULE OF COURT; PAYMENT OF MONEY, AND COLLECTION OF PARTNERSHIP DEBTS.

*Plaintiff a certain Sum: that the Defendant shall permit the Plaintiff to collect for their joint use, several Debts and Sums of Money stated in the Award; that the Plaintiff do use his utmost Endeavours to collect the same: that the Plaintiff may bring Actions in his own Name, or in the Name of the Defendant, or in their joint Names; but if the Plaintiff should bring any Action in the Defendant's Name, without his Consent, the Plaintiff shall indemnify the Defendant from all Costs, if the Action should fail: that the Plaintiff shall not compromise any Action without the Defendant's Consent: that the Plaintiff shall, within one Month after Payment of the Sum awarded, deliver to the Defendant an Account of the Residences of all Persons indebted to *them; and give a Bond to the Defendant to use due Diligence in collecting the Debts; and give the Defendant an Account of his Proceedings; and, as the Debts are received, pay the Defendant a Moiety: that each Party shall pay his own Costs of Reference: and that the Costs of the Award be paid equally.*

[*111]

TO ALL TO WHOM THESE PRESENTS SHALL COME, *We*, [*three arbitrators*], of &c., *send greeting*. WHEREAS an action was lately commenced in his Majesty's Court of King's Bench, in which [*plaintiff*], gentleman, was plaintiff, and [*defendant*], gentleman, was defendant: AND it was, by a certain rule or order of the said Court, made on Wednesday next after fifteen days of the Holy Trinity, in the —— year of the reign of King George the Fourth, by the consent of Mr. ——, of counsel for the plaintiff, and Mr. ——, of counsel for the defendant, *Ordered*, that all matters in dispute between the said parties in the said cause should be referred to the award, order, arbitrament, final end, and determination of us the said [*three arbitrators*], or any two of us; *So as* we, or any two of us, should make and publish our award in writing under our hands, or the hands of any two of us,

Recital of an action in K. B.

referred by rule of Court to three arbitrators, or any two of them;

UNDER A RULE OF COURT; PAYMENT OF MONEY, AND COLLECTION OF PARTNERSHIP DEBTS.

and ready to be delivered to the said parties in difference, or their attornies, or such of them as should desire the same, on or before the —— day of ——, then and now next ensuing; *And* that the said parties should perform, fulfil, and keep such award, so to be made by us the said arbitrators, or any two of us, as aforesaid: And, by the like consent, it was *further Ordered,* that the costs of the said cause should abide the event (*a*) of the said award; *And* that the costs of this present reference should be in the discretion of us, the said arbitrators, or any two of us; who should direct and award, by whom, and to whom, and in what manner, the same should be paid; *As* by the said rule or order, reference being thereto had, will, among other things, more fully appear. Now know ye, that we the said arbitrators, having taken upon ourselves *the burthen of the said reference; and having examined, and duly considered the allegations, vouchers, proofs, and witnesses of the said parties respectively, *Do* make and publish this our award in writing, of and concerning the matters to us referred, as follows: that is to say; We do award, order, and direct, that all proceedings in the said cause shall cease, and be no further prosecuted: And that the said [*defendant*] shall and do pay to the said [*plaintiff*], at &c., between the hours of twelve at noon, and two in the afternoon, on the —— day of —— now next ensuing, the sum of —— pounds; which said sum of —— pounds, we do adjudge and declare to be justly due from the said [*defendant*] to the said [*plaintiff*], for and upon the matters contained in the declaration in the said cause. And we do further award, order, and direct, that the said [*defendant*] shall and do permit and suffer the said [*plaintiff*] to collect, and receive for their joint use, the several debts and sums of money following: that is to say; (*state the names of the debtors, and the amount of their respective debts*). And we do further award, order, and direct, that the said [*plaintiff*] do use his utmost endeavours to collect and receive the said several debts and sums of money accordingly: And that the said [*plaintiff*] shall be at liberty

the costs of the cause to abide the event;

the costs of reference to be in the discretion of arbitrators.

Testatum.

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Award that all proceedings in the cause shall cease:

that the defendant shall pay the plaintiff a certain sum:

that the defendant shall permit the plaintiff to collect for their joint use, several debts and sums of money stated in the award: that the plaintiff do use his utmost endeavours to collect same; that the plaintiff may bring actions in his own name, or in the

(*a*) *Vide ante,* p. 106, n. (*b*).

UNDER A RULE OF COURT; PAYMENT OF MONEY, AND COLLECTION OF PARTNERSHIP DEBTS.

to bring any action or actions, either in his own name, or in the name of the said [*defendant*], or in their joint names, as he may be advised, for the recovery of any debt or debts, sum or sums of money, hereinbefore mentioned; *But nevertheless*, if the said [*plaintiff*] should bring any action in the name of the said [*defendant*], without his consent for that purpose first had and obtained, that then the said [*plaintiff*] shall save harmless, and indemnify the said [*defendant*], from all consequences, costs, charges, and expenses, attending any such action, if the same should happen to fail, and be fruitless. And we do further award, order, and direct, that the said [*plaintiff*] shall not compound, or compromise any action, to be brought for the recovery of any of the said debts or sums of money, without the consent of the said [*defendant*], in writing, for that purpose first had and obtained: And that the said [*plaintiff*] shall, within one month after payment of *the said sum of [*sum awarded*] pounds, deliver to the said [*defendant*], an account of the place of residence of all persons indebted to them, the said [*plaintiff*] and [*defendant*], so far as the said [*plaintiff*] shall know, or be able to ascertain the same; And also at his own expense, enter into, and deliver a bond to the said [*defendant*], in the penalty of —— hundred pounds; with a condition thereunder written, for making the same void in case he the said [*plaintiff*] should use due diligence in collecting all outstanding debts due to them the said [*plaintiff*] and [*defendant*], or wherein they are jointly interested; And shall give to the said [*defendant*], an account of his proceedings, from time to time, within six weeks after any request in writing so to do; And shall also, from time to time, as the same debts are respectively received, pay to the said [*defendant*], one moiety thereof (all reasonable expenses touching the collecting and recovering of such debts being first deducted). And lastly, we do award, order, and direct, that each of the said parties shall and do bear and pay his own costs of this reference (*b*): And

name of defendant, or in their joint names; but if plaintiff should bring any action in defendant's name, without his consent, plaintiff shall indemnify defendant from all costs, if action should fail; that plaintiff shall not compromise any action, without defendant's consent: that plaintiff shall, within one month after payment of sum awarded, deliver to defendant an account of the residences of all [*113] persons indebted to them; and give a bond to defendant to use due diligence in collecting debts; and give defendant an account of his proceedings;

and as debts are received, pay defendant a moiety:

that each party shall pay his own costs of reference;

(*b*) The rule of Court on which the above award is made having ordered that the costs of the cause should abide the event of the award, the arbitrators had no direct authority as to those costs, excepting so far as the

Where a rule of reference orders that the costs of the cause shall

and that costs of award be paid equally.

that the costs of this our award, be paid in equal moieties between them. IN WITNESS, (*c*) &c.

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abide the event, those costs need not be noticed in the award.

subject of costs is affected by the sum awarded. That is the reason why those costs are not noticed in the award. But the arbitrators having awarded more than forty shillings to be due to the plaintiff, he was necessarily entitled to his costs in the cause. *Vide ante*, p. 106, n. (*b*), 109. However, in such a case, the arbitrators sometimes order within what time the costs shall be paid, *ut post*, p. 115. But if the award be silent on this point, the party may recover his taxed costs, in the same manner as if he had obtained on a trial an unconditional verdict for forty shillings. See further, *post*, p. 133, n. (*a*).

Stamp.

(*c*) As to the stamp, *vide ante*, p. 4, n. (*d*).

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UNDER ORDER OF NISI PRIUS; CAUSE TO CEASE, PAYMENT, AND GENERAL RELEASE.

AWARD *under an order of* NISI PRIUS *whereby a Cause, and all Matters in Difference between the Parties, were referred to one Arbitrator; the Costs of the Cause to abide the Event; and the Costs of the Reference to be in the Discretion of the Arbitrator:* THAT *the Cause shall cease: the Defendant to pay the Plaintiff a certain Sum, with Costs of Suit, to be taxed; and a Moiety of the Expenses of the Award; as follows, Part of the Sum awarded, the Costs of the Cause and the Expenses of the Award, on a certain Day; and the Residue of the Sum awarded on a subsequent Day: the Plaintiff, after Payment of the Residue, to execute a General Release to the Defendant, to the Date of the Order of* Nisi Prius, *if such Release, prepared at the Defendant's Expense, be left for the Plaintiff at the Place of Payment: and that if Default be made in Payment of any Part of the Money, the Whole to become instantly due,*

and the Plaintiff may immediately recover the same.

UNDER ORDER OF NISI PRIUS; CAUSE TO CEASE, PAYMENT, AND GENERAL RELEASE.

TO ALL TO WHOM THESE PRESENTS SHALL COME. I, [*arbitrator*], of &c., *send greeting*. WHEREAS at the sitting at *Nisi Prius*, holden at the Guildhall of the city of London, (*or* at Westminster Hall, in the great Hall of Pleas there, in and for the county of Middlesex) on the —— day of ——, 18—, before the Right Honourable Sir Charles Abbott, Knight, Lord Chief Justice of our Lord the King, assigned to hold pleas before the King himself, a cause came on to be tried, wherein [*plaintiff*] was plaintiff, and [*defendant*], defendant; and thereupon, a certain order of *Nisi Prius* was then and there made; whereby *It was ordered* by the court, by and with the con*sent of the plaintiff and defendant, their counsel and attornies, that the said cause, and all other matters in difference between the parties, should be referred to the award, order, arbitrament, final end, and determination, of me the said [*arbitrator*]; *so as* I should make and publish my award in writing, of and concerning the premises in question, on or before the —— day of —— term, then and now next ensuing: *And it was also ordered*, by and with such consent as aforesaid, that the costs of the cause should abide the event and determination of the said award; *And* that the costs of the reference should be in the discretion of me the said arbitrator; who should direct and award by whom, and to whom, and in what manner the same should be paid. NOW KNOW YE, that I, the said [*arbitrator*], having taken upon myself the said reference, and having heard, examined, and considered the several allegations and proofs of the said parties respectively, *Do*, in pursuance of the said reference, make and publish this my award in writing, of and concerning the matters so referred to me as aforesaid, in manner following: that is to say; I do award, order, and direct, that the said cause shall cease, and be no further prosecuted: AND that the said [*defendant*], his executors or administrators, shall and do pay to the said [*plaintiff*], his executors, or administrators, or such other person as he or they shall or may lawfully authorize to receive the same, at the office of Messrs. ——, attornies at

Recital of an order of *Nisi Prius*, whereby a cause, and all matters in difference between the parties, were referred to one arbitrator;

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the costs of the cause to abide the event; and the costs of the reference to be in the discretion of the arbitrator.

Testatum.

Award, the cause to cease;

defendant to pay plaintiff a certain sum, with costs of suit to be taxed;

UNDER ORDER OF NISI PRIUS; CAUSE TO CEASE, PAYMENT, AND GENERAL RELEASE.

law in ——, the sum of —— pounds, together with the costs of the said cause (*a*), to be taxed by the proper officer of the said court; *And* the further sum of —— pounds, as and for one moiety of the expenses of this my award, at the times and in manner following: that is to say; the sum of —— pounds, parcel of the said sum of [*sum awarded*] pounds, together with the costs of the said cause, and the said sum of [*expenses of award*] pounds, on the —— day of —— now next ensuing, between the hours of —— and —— in the ——noon of the same day; *And* the further sum of —— *pounds, residue of the said sum of [*sum awarded*] pounds, on the —— day of —— now next ensuing, between the same hours: And I do further award, order, and direct, that the said [*plaintiff*], his executors, or administrators, shall and do, within —— days after payment of the said last-mentioned sum, seal and deliver to the said [*defendant*], his executors, or administrators, a general release of all actions, claims, and demands, to the day of the date of the said order of *Nisi Prius;* if such release, prepared at the expense of the said [*defendant*], his executors or administrators, should be tendered or left for him at the said office, on the said —— day of ——, at the time of payment of the said last-mentioned sum of [*residue*] pounds. And lastly, I do award, order, and direct, that, if default should be made in payment of all, either, or any part of the sums of money herein by me directed to be paid, at the place and times in that behalf appointed, then and thenceforth, all the monies herein directed to be paid, or so much thereof as shall then remain unpaid, shall become instantly due and payable; and the said [*plaintiff*] may immediately use such lawful means for obtaining payment thereof, as he might have done, if the whole of the said monies, or such part thereof as shall then remain unpaid, had been herein directed to be paid, on the day at which such default shall happen to be made, and such direction had not been complied with. In witness, &c.

and a moiety of the expenses of award; as follows:
part of the sum awarded, the costs of the cause, and the
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expenses of the award, on a certain day; and the residue of the sum awarded on a subsequent day:
plaintiff, after payment of residue, to execute a general release to defendant, to the date of the order of *Nisi Prius*, if such release, prepared at defendant's expense, be left for plaintiff at the place of payment:
if default be made in payment of any part of the money, the whole to become instantly due, and plaintiff may immediately recover same.

(*a*) *Vide ante*, p. 113, n. (*b*).

AWARD *under an Order of* Nisi Prius, *that the Cause shall cease: that the Defendant shall pay the Plaintiff a Sum for holding over after the Expiration of the Lease; and a further Sum for Breach of Covenants, in not repairing* (*a*).

UNDER ORDER OF NISI PRIUS; PAYMENTS FOR HOLDING OVER, AND BREACH OF COVENANTS.

NOW KNOW YE, &c. I do award, order, and direct, that the said cause shall cease, and be no further prosecuted: AND that the said [*defendant*], his executors or

Award, cause to cease:

defendant to

(*a*) After an action brought for not repairing a house, &c., the matters in difference had been referred to arbitrators, who made their award upon a view of the premises, without calling the parties before them, the Court set aside the award; and Lord *Ellenborough*, C. J., said, that though the premises might almost tell their own tale, yet there might be other facts which should be inquired into, such as payments by the party, or excuses for not repairing, &c. &c. *Anon.* 2 Chit. Rep. 44.

Award in an action for not repairing, made by arbitrators upon view of the premises, without calling the parties before them, will be set aside.

For want of notice of the meeting of the arbitrators is a ground for setting aside an award. *Anon.* 1 Salk. 71.

W nt of notice of meeting a ground for setting aside award.

Where a rule *nisi* had been obtained in a preceding term, to set aside an award, on the ground that the arbitrators having partly proceeded in the reference, declared they could take no further proceedings, till some books of account had been looked into and examined; that the defendant, in consequence, left the meeting, considering the proceedings as suspended till those books had been referred to; but that the arbitrators afterwards examined a witness, in the absence of the defendant, when they determined that it was unnecessary to inspect the books, and signed a minute of their award, which was not executed till after the application to set it aside had been made:—on shewing cause against the rule, the Court held, that at all events the defendant should have had notice that it was unnecessary for the arbitrators to have inspected the books, and that it was immaterial whether the award was actually executed before the application to set it aside was made; and the rule was made absolute. *Pepper* v. *Gorham*, 4 J. B. Moore, 148. The circumstance, that the witness was examined in the absence of the party, was of itself a sufficient ground

If arbitrators, having proceeded in a reference, inform the defendant present at the meeting, that they would suspend their proceedings till books of account had been referred to, and they afterwards make an award in his absence, without examining such books, it is a good ground for setting aside the award.

UNDER ORDER OF NISI PRIUS; PAYMENTS FOR HOLDING OVER, AND BREACH OF COVENANTS.

pay plaintiff a sum for holding over;

administrators, shall and do pay to the said [*plaintiff*], his executors, administrators, or assigns, on the —— day of —— now next, at ——, the sum of —— pounds, for the use and occupation, and as the value of the said premises, during the time the same were held over, after the expiration of the said lease; And the further sum of

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for setting aside the award. *Bedington* v. *Southall*, 4 Price, 235, 236; *ante*, p. 3, n. (c).

Arbitrator has power, subject to his discretion, to proceed *ex parte*, if one of the parties, or his solicitor on his behalf, will not attend a meeting, of which reasonable notice is given.

But if the parties neglect to attend in person, or by attorney, the arbitrator's appointment regularly notified to them, he may proceed *ex parte*. *Waller* v. *King*, 9 Mod 63. Caldw. on Arb. 45. [1 Jac. & Walk. 512]. For every arbitrator has the power to proceed *ex parte*, if one of the parties, though duly summoned, will not attend, with a view to prevent justice, and defeat the object of the reference. The arbitrator is to judge of the discretion of it. *Wood* v. *Leake*, 12 Ves. 412. Nor is it any ground to set aside an award, that the solicitor takes upon him to say, he cannot attend at the time the arbitrators appoint. He must attend, if they make a reasonable appointment. *Fetherstone* v. *Cowper*, 9 Ves. 68.

[But in a late case, the Court of Common Pleas set aside an award, on the ground that one of the parties had been examined in the absence of the other, though the absent party had notice of the meeting. In the matter of *Hick*, 8 Taunt. 694.

Award set aside on account of the absence of the attorney of one of the parties.

[So, where a defendant having, at the trial of an action on the case, agreed to enter into a rule of *nisi prius*, to repair and reinstate a certain dwelling-house, which he had wrongfully damaged, it was referred to a barrister to settle what sum should be paid in lieu of his doing this. At the first meeting under the arbitration the defendant's attorney produced no witnesses, though he had had ample notice; but the plaintiff's witnesses gave in their estimate, and the arbitrator, after viewing the premises, appointed a day for a second meeting. The defendant's attorney called before that day, and said that his witnesses (two surveyors who had known the premises before the action) could not attend; the arbitrator, although one of these witnesses might have attended the first meeting, appointed a third meeting for a future evening. On the morning of that day, defendant's attorney called on the arbitrator and left an affidavit, stating, that one of the two surveyors was confined to his bed, and the other gone to France. The arbitrator then entreated the defendant's attorney to procure other surveyors, and offered, if he, the attorney, would name a day, to come to London to hear them, or any other witnesses. The attorney refused to name a day, or to procure other surveyors, though another surveyor and a carpenter had attended the trial of the cause on the defendant's behalf. The arbitrator then gave the defendant's attorney notice,

—— pounds, for and on account of the breach of the said covenants, so far as concerns the supporting, maintaining, keeping, and leaving in repair the dwelling houses and other buildings erected and standing on the said premises, at the date of the said lease, or erected and built thereon during the said term for habitation.

UNDER ORDER OF NISI PRIUS; PAYMENTS FOR HOLDING OVER, AND BREACH OF COVENANTS.

and a further sum for breach of covenants in not repairing.

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that if the plaintiff's attorney appeared at the meeting, and insisted on the award, he should feel himself bound to make one. The defendant's attorney then gave notice to the plaintiff's attorney that he could not attend: when the plaintiff's attorney said he would attend and call for the award. The award was made accordingly. The defendant's attorney swearing he understood the arbitrator meant to have called another meeting, the Court set aside the award, though no objection was made to the amount awarded; leaving, however, the plaintiff at liberty to enforce the defendant's agreement to enter into the rule of *nisi prius*, for the reinstating the premises. *Dodington* v. *Hudson*, 1 Bing. 384].

On a reference by order of *Nisi Prius*, or by rule of Court, a party may apply for a rule to shew cause why his opponent should not attend the arbitrators, or why they should not be directed to proceed *ex parte*.

In the case of a reference by order of *Nisi Prius*, or by rule of Court, according to the statute, a party may apply for a rule to shew cause why his opponent should not attend before the arbitrators, or why the latter should not be directed to make their award, without waiting for such attendance. Thus, where on a trial at *Nisi Prius* it appeared, that the demand of the plaintiff arose on a long and intricate account, which in almost every article was impeached by the defendant, who also set up a counter demand of the same nature, by way of set off; it was referred by consent; and the plaintiff neglecting to carry in his vouchers to the arbitrator, before the time limited for making the award, the time was several times enlarged, till at length the defendant, after upwards of six months' delay on the part of the plaintiff, made an application to the Court, on an affidavit, stating these circumstances, for a rule to shew cause why the plaintiff should not carry in his vouchers within a certain day, and why the time should not be further enlarged, or why, on the plaintiff's further default, the arbitrator should not be directed to proceed on hearing the defendant alone; the rule was granted without hesitation; and the plaintiff, instead of shewing cause against it, peremptorily undertook to deliver in his vouchers within the time specified. *Hetley* v. *Hetley*, in the Exchequer, M. 1789, cited Kyd on Awards, 100.

Partiality and improper conduct in the arbitrator, in making his award, cannot be pleaded in bar to an arbitration bond; *Braddick* v. *Thompson*, 8 East, 344; *ante*, Vol. 2, p. 574, n. (*e*); but is only a ground for an application to the Court. *Ante*, Vol. 2, p. 578.

UNDER ORDER OF NISI PRIUS; GOOD CAUSE OF ACTION BY EXECUTORS, PAYMENTS, &c.

AWARD *under an Order of* Nisi Prius, *in a Cause wherein* Executors *were Plaintiffs, whereby all Matters in Difference between the Testator and the Defendant were referred to one Arbitrator; the Verdict to be entered as he should think fit; the Costs of the Cause, as to the Defendant, to abide the Event of the Award; the Costs of the Reference to be in the Discretion of the Arbitrator: the Order afterwards made a Rule of the King's Bench, and several Enlargements of the Time for making the Award, at Defendant's Request: the Plaintiffs delivered a Declaration* by the bye, *against the Defendant; and a Chancery Suit commenced by the Defendant against the Plaintiffs; and both Actions and Suit were pending at the time of the Reference:*—That *with respect to* the first Action, *the Plaintiffs had good Cause of Action against the Defendant, for principal Monies due to the Testator, which, with Interest to the* 10*th December, will* [*120] *amount to* 303*l.* 11*s.* 4*d.; for which Plaintiffs may enter a Verdict and sign Judgment, in case the Sums and Costs awarded be not duly paid; but to be a Security only for such Sums and Costs as shall not be duly paid, with the Costs of entering Verdict, &c. With respect to the Action,* by the bye, *that the Plaintiffs had good Cause of Action against the Defendant for* 190*l.*, *due to the Testator: And with respect to* the Chancery Suit, *that the Defendant shall cause his own Bill to be dismissed, with Costs, to be taxed, and to be paid by him to the Plaintiffs: that all Proceedings in Law and Equity shall be stayed: that the*

Defendant shall pay the Plaintiffs, at &c., the Sums awarded, with the Costs of both Actions, and the Costs of Reference and Award; the Costs to be taxed. Recital, *that, pending the Reference, an Exchequer Bill for* 400*l. has been purchased with Defendant's Money, and deposited to abide the Event of the Award;* FURTHER AWARD, *that the Exchequer Bill, and all other Bills received in Exchange for it, be sold by* 10*th December; the Produce, and all Benefit of the Bills, to be paid to the Plaintiffs, as Part of the Money and Costs awarded: That the Plaintiffs shall accept the Money and Costs awarded, in full of all Demands, as Executors, upon the Defendant.*

UNDER ORDER OF NISI PRIUS; GOOD CAUSE OF ACTION BY EXECUTORS, PAYMENTS, &c.

Exordium.

TO ALL TO WHOM THESE PRESENTS SHALL COME, I, [*arbitrator*], of Lincoln's Inn, in the County of Middlesex, Barrister at Law, *send Greeting.*—WHEREAS, by a certain order, made at the sitting at *Nisi Prius*, held at Guildhall, in and for the city of London, on the —— day of ——, in the year of our Lord 18—, before the Right Honourable Sir Charles Abbott, Knight, Lord Chief Justice of our Lord the King, assigned to hold pleas before the King himself, in a certain cause then depending in the same Court, wherein [*plaintiffs*], executrix and executor of the last will and testament of [*testator*], deceased, were * plaintiffs, and [*defendant*] was defendant: *It was ordered* by the Court, by and with the consent of the plaintiffs and defendant, their counsel and attornies (amongst other things), that all matters in difference between the said [*testator*], the testator (*a*), and the defendant, both at law and in equity, should be referred to the award, order, arbitrament, final end, and determination of me the said [*arbitrator*]; *And* that a verdict should be entered, as I should think fit; *so as* I should make and publish my award in writing, of and concerning the premises in question, on or before the second day of Easter Term then

Recital of an order of *Nisi Prius*, in cause wherein executors were plaintiffs.

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whereby all matters in difference between testator and defendant were referred to one arbitrator;

verdict to be entered as he should think fit; so that, &c.

(*a*) *Vide, ante*, p. 88, n. (*b*).

UNDER ORDER OF NISI PRIUS; GOOD CAUSE OF ACTION BY EXECUTORS, PAYMENTS, &c.

parties to perform award: costs of cause, as to defendant, to abide the event of award: costs of reference to be in discretion of arbitrator. Order afterwards made a rule of K. B. Recital of several enlargements, at defendant's request. Recital of last enlargement.

next ensuing: *And* that the said parties should and would perform, fulfil, and keep such award, so to be made by me the said arbitrator, as aforesaid: *And* that the costs of the cause, as to the defendant (*b*), should abide the event and determination of my said award: *And* that the costs of the reference should be in the discretion of me the said arbitrator, who should direct and award by whom and to whom, and in what manner, the same should be paid. *And* which said order was afterwards entered and made a rule of His Majesty's Court of King's Bench. AND WHEREAS, at the request of the said defendant and his solicitors, and in order to give the said defendant time to produce evidence in support of his case, the time for making this my award has been, by certain rules or orders of the said Court of King's Bench, from time to time duly enlarged. AND WHEREAS, by a certain other rule or order of the said Court of King's Bench, made on Thursday after the Feast of St. Martin now last past, *It was ordered*, that the time limited for me the said arbitrator, making my award between the said parties, should be enlarged until (*c*) the last day of the then and now next term. AND WHEREAS the said [*plaintiffs*], as such executrix and executor as aforesaid, delivered a declaration by the bye (*d*), in the * said Court of King's Bench, against the said [*defendant*], for the recovery of other money, alleged to be due and owing by the said [*defendant*] to the said testator. AND WHEREAS also a certain suit in the Court of Chancery was commenced by the said [*defendant*] against the said [*plaintiffs*], as such executrix and executor as aforesaid: *And* which said two several actions, as well as the said suit in Chancery, were pending at the time of the making of the said first mentioned order. NOW KNOW YE, that I the said arbitrator having taken upon myself the burthen of the said reference, and having heard, examined, and duly considered the allegations, vouchers, proofs, and wit-

Recital that plaintiffs delivered a declaration *by the bye* against defendant:

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that a Chancery suit was commenced by defendant against plaintiffs: and that both actions and suit were pending at the time of reference.

Testatum.

(*b*) See *Highnam* and another, executors, v. *Hassell*, *ante*, p. 106, n. (*b*).

(*c*) *Vide ante*, p. 43, n. (*b*).

By the bye.

(*d*) A declaration *by the bye* is at the suit of a *different* plaintiff, or of the *same* plaintiff for a *different* cause of action. 1 Tidd's Prac. 422, 429, 7th ed.

nesses of the said parties respectively, *Do* make and publish this my award in writing, of and concerning the matters to me referred as aforesaid, as follows: that is to say; *With respect* to the said first mentioned action, wherein the said order and rules were made, I do award, adjudge, and declare, that the said [*plaintiffs*], as such executrix and executor as aforesaid, had good cause of action against the said [*defendant*], for divers principal sums of money bearing interest, due from him to the said testator, which with interest thereon, calculated up to the tenth day of December now next ensuing, do and will amount to the sum of 303*l.* 11*s.* 4*d.*; and for which said sum of 303*l.* 11*s.* 4*d.*, they the said [*plaintiffs*] may cause a verdict to be entered in the said first-mentioned action, and sign judgment thereon against the said [*defendant*], in case the several sums of money, and costs herein by me directed to be paid by him to them, shall not be duly paid at the time and place hereinafter appointed for that purpose†; *But* such verdict and judgment shall stand and be a security only for so much of such sums and costs as shall not be duly paid, together with the further costs of entering the said verdict, and signing judgment thereon, and consequent thereto: *And with respect* to the said other action by the bye, I do award, adjudge, and declare, that the said [*plaintiffs*], as such executrix and executor as aforesaid had good cause of action against the said [*defendant*], for the sum of 190*l.*, due and owing by him to the said testator: *And with respect* to the said suit in Chancery, I do award, order, and direct, that the said *[*defendant*] shall forthwith cause his own bill therein to be dismissed, with costs, to be taxed by the proper officer of the said Court of Chancery; and which costs I direct to be paid by him the said [*defendant*] to the said [*plaintiffs*] at the

UNDER ORDER OF NISI PRIUS; GOOD CAUSE OF ACTION BY EXECUTORS, PAYMENTS, &c.

Award: with respect to the first action, that plaintiffs had good cause of action against defendant, for principal monies due to testator, which, with interest to 10th Dec., will amount to 303*l.* 11*s.* 4*d.*; for which plaintiffs may enter a verdict and sign judgment, in case the sums and costs awarded be not duly paid; but to be a security only for such sums and costs as shall not be duly paid, with the costs of entering verdict, &c. With respect to the action *by the bye*, that plaintiffs had good cause of action against defendant for 190*l.*, due to testator: [*123] and with respect to Chancery suit, that defendant shall cause his own bill to be dis-

[† Where an arbitrator directed a verdict to be entered for the plaintiff which carried costs, and directed a sum of money to be paid by the plaintiff to the defendant, within two months from the date of the award; it was held that the defendant was not entitled to set off this sum against the costs, the two months not having elapsed, but was bound to pay the costs immediately upon their being taxed. *Young* v. *Gye*, 10 J. B. Moore, 198.]

Sum payable at a future time cannot be set off against costs immediately due.

UNDER ORDER OF NISI PRIUS; GOOD CAUSE OF ACTION BY EXECUTORS, PAYMENTS, &c.

time and place hereinafter mentioned: And that all proceedings, both in law and equity, shall be forthwith stayed, and no further prosecuted, except as to the entering the said verdict, and the proceedings consequent thereupon. And I do award, order, and direct, that the said [*defendant*] shall and do pay to the said [*plaintiffs*], as such executrix and executor as aforesaid, at the chambers of Mr. ——, their attorney in the said action, situate in Lincoln's Inn, aforesaid, on the tenth day of December now next ensuing, between the hours of twelve at noon and two in the afternoon, as well the said sum of 303*l.* 11*s.* 4*d.*, as the said sum of 190*l.*, together with the costs of both the said actions, and also the costs of the said reference, and of this my award: such costs to be in the mean time taxed by the proper officer of the said Court of King's Bench. And whereas pending the said reference, a certain Exchequer bill for the sum of 400*l.*, has been purchased with the money of the said [*defendant*], and deposited with certain bankers, to abide the event of this my award. Now I do further award, order, and direct, that the said Exchequer bill, and all other Exchequer bills (if any), which may have been received in exchange for the same, be sold, and converted into money, on or before the said tenth day of December: *And* that all money produced by such sale, and also all money and benefit that may have been received and arisen upon all such Exchequer bills, as well by way of interest as otherwise, be paid to the said [*plaintiffs*], as such executrix and executor as aforesaid, on the said tenth day of December, at the place aforesaid, as a part of and in reduction of the several sums of money and costs herein by me directed to be paid by the said [*defendant*], as aforesaid. And I do further award and order, that the said [*plaintiffs*] shall and do accept the said several sums of money and costs herein by me awarded to be paid, in full satisfaction and discharge of all demands by them, as such executrix and executor as aforesaid, upon the said [*defendant*]. In witness, &c.

missed, with costs to be taxed, and to be paid by him to plaintiffs; that all proceedings in law and equity shall be stayed; that defendants shall pay plaintiffs, at &c., sums awarded; with costs of both actions; and the costs of reference and award; costs to be taxed.

Recital that, pending reference, exchequer bill for 400*l.* has been purchased with defendant's money, and deposited to abide the event of award.

Further award, that Exchequer bill, and all other bills received in exchange for it, be sold by 10th Dec.: produce and all benefit of the bills, to be paid to plaintiffs, as part of the money and costs awarded: that plaintiffs shall accept money and costs awarded in full of all demands, as executors, upon defendants.

AWARD *under an Order of* Nisi Prius *at the Assizes, whereby it was ordered that a Verdict should be entered for the Plaintiff, Damages 30l., Costs 40s., subject to a Reference of all Matters in Difference: that the Costs of the Cause should abide the event of the Award: that the Costs of the Reference should be in the Discretion of the Arbitrator: and that the Arbitrator might direct an Application to the Court to enlarge the Time; and the Time for making the Award was enlarged by the Court:* THAT *the Verdict found for the Plaintiff do stand: that the Defendants pay the Plaintiff the Costs of the Reference and Award: and that the Defendants have no claim on the Plaintiff in respect of a Vessel mentioned in the Pleadings.*

UNDER ORDER OF NISI PRIUS; VERDICT TO STAND, PAYMENT OF COSTS OF REFERENCE, &c.

TO ALL TO WHOM THESE PRESENTS SHALL COME, I, [*arbitrator*], of the Inner Temple, Barrister at Law, *send greeting.* WHEREAS a certain action at law, depending in his Majesty's Court of Common Pleas, wherein [*plaintiff*] was the plaintiff, and [*defendant*] the younger, and [*other defendant*], were the defendants, came on to be tried at the Assizes holden at ——, in and for the county of ——, on —— the —— day of July, in the —— year of the reign of his present Majesty King George the Fourth, before the Right Honourable Sir Charles Abbott, Knight, Lord Chief Justice of our said Lord the King, assigned to hold pleas before the King himself, and the Honourable Sir James Burrough, Knight, one of the Justices of our said Lord the King, of his Court of Common Pleas, at Westminster; Justices of our said Lord the King, appointed to take the Assizes for the said county of ——, according to the form of the statute in that

Exordium.

Recital of an order of *Nisi Prius*, at the assizes, whereby it was ordered that a verdict should be entered for the plaintiff, damages 30*l.* costs 40*s.*, subject to a reference of all matters in difference;

UNDER ORDER OF NISI PRIUS; VERDICT TO STAND, PAYMENT OF COSTS OF REFERENCE, &c.

case made and provided; *It was ordered* by the said Justices, in open Court, by and with the consent of the said parties, their counsel and attornies, that a verdict should be entered for the plaintiff, damages thirty pounds, costs forty shillings; *But* that such verdict should be subject to the award, order, arbitrament, final end, and determination of me the said [*arbitrator*]; to whom it was thereby referred to settle all matters in difference between the said parties (*a*); and to order and determine what I the said arbitrator should think fit to be done by either of them, respecting the matters in dispute; who agreed to be bound and concluded by such determination, and to remain contented and satisfied therewith; *so as* I the said arbitrator should make and publish my award in writing, concerning the premises, on or before the second day of the then next Michaelmas Term. AND *it was also ordered*, that the costs of the said cause should abide the event of my said award: *And* that the costs of this present reference should be in the discretion of me the said arbitrator, who might direct and award, to and by whom, and in what manner, the same should be paid. AND *it was also ordered*, that I, the said arbitrator, might direct that an application (*b*),

so as, &c.

that the costs of the cause should abide the event of the award: that the costs of the reference should be in the discretion of the arbitrator.

If by the associate's mistake the order mentions all matters in difference *between the parties*, instead of *in the cause*, it cannot be amended.

(*a*) If all matters in difference *in the cause* are agreed to be referred, and the associate, by mistake, draws up the order of reference generally, as to all matters in difference *between the parties*, it cannot be amended; but the parties must go down to another trial. *Rawtree* v. *King*, 5 J. B. Moore, 167.

Where arbitrator has power to make "an application" to the Court for enlargement of the time for making his award, he may make several applications, and is not *functus officio* at the expiration of the time granted by the first enlargement.

(*b*) Where the submission expressed that the arbitrator should be at liberty to make "another" application to the Court, for an enlargement of the time in which he was to make his award; many applications had been made, and enlargements accordingly: and the question, upon an application to set aside the award, was, whether "an application" was to be construed to mean only *one* application, or whether several applications, from time to time, could be said to be within the meaning of the terms of the submission. Mr. Justice *Dampier* said he was inclined to the latter opinion; but wished the point to be considered, and the construction settled. In support of the award, it was stated that it had been decided in the Common Pleas, (*Payne* v. *Deakle*, 1 Taunt. 509; *Barrett* v. *Parry*, 4 Taunt. 658; *ante*, Vol. 2, p. 632, n. (*d*)), that where the submission was, that the arbitrator might apply to enlarge the time for making his

should be made to the said Court of Common Pleas, to enlarge the time for making my said award, in case I the said arbitrator should think fit so to do. And whereas, by a certain other rule or order, made on the —— day of November, in Michaelmas Term, in the —— year of the reign of his said Majesty, agreeably to the power by the several parties to the said cause for that purpose given; and on hearing counsel for me the said arbitrator, *it was* by the said Court of Common Pleas *ordered*, that the time for me the said arbitrator to make my award should be, and the same was thereby enlarged, until —— the —— day of this instant November. Now know ye, that I the said arbitrator, having taken upon myself the burthen of the said reference; and having heard, and duly considered the allegations, vouchers, proofs, and witnesses of the said parties, *Do* make and publish this my award in writing, of and concerning the matters to me referred, as follows: that is to say; I do award and order, that the verdict so found for the said plaintiff, as aforesaid, shall stand and be in force: And that the said defendants shall and do pay to the said plaintiff the costs of this reference and award, to be taxed by the proper officer of the same Court. And I do further award and adjudge, that the said defendants have not any claim or demand upon the said plaintiff, in respect of, or in any manner relating to, the vessel called the —— in the pleadings of the said action mentioned. In witness, &c.

UNDER ORDER OF NISI PRIUS; VERDICT TO STAND, PAYMENT OF COSTS OF REFERENCE, &c.

and that the arbitrator might direct an application to the Court to enlarge the time.

Recital of enlargement by the Court, of the time for making the award.

Testatum.

Award that verdict found for plaintiff do stand:

that defendants pay plaintiff costs of reference and award: that defendants have no claim on plaintiff in respect of a vessel mentioned in pleadings.

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award, it meant that he might do so from time to time. But Mr. Justice *Dampier* wished the point to be settled in the Court of King's Bench, and therefore granted a rule *nisi*, which was afterwards discharged without costs. *Anon.* 2 Chit. Rep. 45.

UNDER ORDER OF NISI PRIUS IN C. P.; PLAINTIFF NO CAUSE OF ACTION.

AWARD *under an Order of* Nisi Prius, *in the Common Pleas, whereby the Jury was directed to find a Verdict for the Plaintiff, for —— Pounds Damages, subject to a Reference of all Matters in Difference; so as the Arbitrator made his Award by a given Day, or any other Day to which he should enlarge the Time: and it was ordered, that the Arbitrator might examine the Parties upon Oath; and that the Parties and Witnesses might be sworn before a Judge of the Court: that the Parties should produce before the Arbitrator, all Books, &c.; that the Costs of the Suit should abide the Event of the Award, and the Costs of Reference be in the Arbitrator's Discretion:—*That *the Plaintiff had no Cause of Action: that instead of the Verdict and Damages for the Plaintiff, a Verdict be entered for the Defendant: and that the Plaintiff and Defendant shall bear their own Costs of the Reference, and of the Award.*

Exordium.

Recital of an order of *Nisi Prius* in C. P. whereby the jury was directed to find a verdict for the plaintiff for —— pounds damages, subject to a reference of all matters in difference;

TO ALL TO WHOM THESE PRESENTS SHALL COME, I, [*arbitrator*], of &c., *send greeting*. WHEREAS at the sitting at *Nisi Prius* after —— Term last, holden at the Guildhall of the city of London, (*or* at Westminster, in the great hall of pleas there, in and for the county of Middlesex,) on —— the —— day of ——, in the year of our Lord 18—, before the Right Honorable Sir Robert Dallas, knight, Lord Chief Justice of his Majesty's Court of Common Pleas, at Westminster, a certain order was made, in a cause then depending in the same Court, wherein [*plaintiff*] was plaintiff, and [*defendant*] was defendant; whereby (amongst other things) *It was ordered* by the Court, by and with the consent of all parties, their counsel, and attornies, that the jury should find a verdict for the plaintiff for —— pounds damages, subject to the award,

order, arbitrament, final end, and determination of me the said [*arbitrator*], to whom all matters in difference between the said parties were thereby referred; *so as* I the said arbitrator did and should make and duly publish my award in writing, of and concerning the matters referred, ready to be delivered to the said parties, or to either of them requiring the same, on or before the —— day of —— Term next ensuing the day of the date of the said order; or on or before any other day (*a*) to which I the said arbitrator should enlarge the time for making my said award: *And*, by the like consent, *it was also ordered*, that I the said arbitrator should, and might be at liberty, if I should think fit, to examine the parties to that suit upon oath; and for that purpose, the said parties, and also the witnesses to be examined before me the said arbitrator, touching the matters referred, should and might be sworn before the Right Honourable the Lord Chief Justice, or some other judge of his Majesty's said Court of Common Pleas: *And* that the said parties should produce before me the said arbitrator, all books, deeds, papers, and writings whatsoever, in their, or either of their custody or power, relating to the matters in difference: *And*, by the like consent, *it was also ordered*, that the costs of the said suit should abide the event of the said award, so to be made and published as aforesaid; *And* that the costs of the reference should be in the discretion of me the said arbitrator; *As* by the said order more fully appears. NOW KNOW YE, that I the said [*arbitrator*], the arbitrator aforesaid, having taken upon me the burthen of the said arbitrament; and having heard, examined, and considered the allegations and proofs of both the said parties concerning the premises, *Do* thereupon make this my award in writing concerning the same, in manner and form following: that is to say; I do award, adjudge, and determine, that, at the time of commencing the said suit, the said [*plaintiff*] had no cause of action whatever against the said [*defendant*], in respect of the

UNDER ORDER OF NISI PRIUS IN C. P., PLAINTIFF NO CAUSE OF ACTION

so as the arbitrator made his award by a given day;

or any other day to which he should enlarge the time: that the arbitrator might examine the parties upon oath; and that the parties and witnesses might be sworn before a judge of the court:

that the parties should produce before arbitrator all books, &c.

that costs of suit should abide event of award; and costs of reference be in arbitrator's discretion.

Testatum.

Award.

that the plaintiff had no cause of action:

(*a*) If an arbitrator has power to enlarge the time for making his award to any other *day*, the Court will expound it to mean to any other *days*. *Vide ante*, Vol. 2, p. 632, n.(*d*); *ante*, p. 125, n.(*b*).

As to enlargement of time, *day* means *days*.

that instead of verdict and damages for plaintiff, a verdict be entered for defendant; and that plaintiff and defendant shall bear their own costs of reference and award.

said matters to me referred. And I do thereupon award, order, and direct, that instead of the said verdict and damages so found for the said plaintiff, a verdict in the said action be entered for the said [*defendant*]. And I do further award, order, and direct, that the said [*plaintiff*] and [*defendant*] shall respectively bear and pay their own costs of the reference, and of this my award. In witness, &c.

UNDER JUDGE'S ORDER ON AGREEMENT, OF RIGHT TO FURNITURE AND DAMAGES.

AWARD *after an Action against a Sheriff, on a Reference of all Matters in Difference between the Parties, by a* Judge's Order, *pursuant to the Terms of an* Agreement *between the Parties set forth in the Order, and reciting, that the Plaintiff claims a House, Furniture, &c., under a Bill of Sale, and an Assignment of the Lease: that another claims the Value of the Furniture under a* fi. fa. *on which the Furniture has been seized by the Sheriff, who has had joint Possession with the Plaintiff, being indemnified by Claimant: and the Agreement being that the Plaintiff shall have entire Possession; and the Claims referred to an Arbitrator; if he should determine that the Claimant is entitled to the Value, the Plaintiff undertakes to pay the same; if he should determine that the Plaintiff is entitled, the Arbitrator to award Damages to the Plaintiff, to be paid by the Claimant; the Costs of the Arbitration, &c., to be paid by him, who shall be declared not to be entitled; so as the Award be made by a given Day; but the Time was several times enlarged by the Court, with the Consent of the Parties;—* That *the Claimant had no Right to the Fur-*

niture, but that the Plaintiff was entitled: and that the Claimant pay the Plaintiff one Shilling Damages.

UNDER JUDGE'S ORDER, ON AGREEMENT, OF RIGHT TO FURNITURE, AND DAMAGES.

Exordium.

TO ALL TO WHOM THESE PRESENTS SHALL COME, I, [*arbitrator*], of Gray's Inn, in the county of Middlesex, Barrister at Law, *send greeting.* WHEREAS an action was lately commenced in his Majesty's Court of Common Pleas, by [*plaintiff*], against [*defendant*], (he the said [*defendant*] then, or lately before, being Sheriff of the county of ——): AND it was on the seventh of June now last past, by Sir *Robert Dallas*, knight, Lord Chief Justice, of the said court, upon hearing the attornies or agents on both sides, and by their consent (*a*), *Ordered* (amongst other things), that all matters in difference between the parties should be referred to the award, order, arbitrament, final end, and determination, of me the said [*arbitrator*], pursuant to the terms and conditions of a certain agreement, executed between the parties, and set forth in the said order, and which is as follows; "*Whereas* the said [*plaintiff*] claims to be entitled to the lease of a house, premises, and fixtures, situate at ——, in the county of ——, lately occupied by one [*tenant*]; and also to the household goods and furniture therein and thereupon, under and by virtue of a certain bill of sale, and an assignment of such lease, bearing date respectively the twenty-third day of January last: *And whereas* one [*claimant*] claims to be entitled to the value of the said household furniture, under and by virtue of a writ of *fieri facias*, issued out of his Majesty's Court of King's Bench, at the suit of the said [*claimant*] upon a judgment obtained by him against the said [*tenant*]; on which the said household furniture has been seized by the Sheriff of ——; and the said Sheriff, and the said [*plaintiff*], have had the joint possession thereof, from the time of levying such execution; and the said Sheriff hath hitherto refused to quit and give up the same to the said [*plaintiff*], being indemnified for so doing by the said [*claimant*]: *Now it is hereby mutually agreed*, that the said execution shall be with-

Recital of an action against a sheriff:

and of a reference of all matters in difference between the parties, by a judge's order, pursuant to the terms of an agreement between the parties set forth in the order, and reciting,

that plaintiff claims a house, furniture, &c. under a bill of sale, and assignment of the lease:

that another claims the value of furniture, under a *fi. fa.*

on which same has been seized by sheriff, who has had joint possession with plaintiff, being indemnified by claimant:

agreement that plaintiff shall have entire possession;

(*a*) *Vide ante*, p. 99, n. (*b*).

UNDER JUDGE'S ORDER, ON AGREEMENT, OF RIGHT TO FURNITURE, AND DAMAGES.

drawn, and the said [*plaintiff*] be left in the entire possession of the said house, household goods, and chattels: *And* that it be referred to [*arbitrator*], esquire, an arbitrator mutually appointed by the said parties, to investigate the nature of their respective claims: *And* if the said arbitrator should determine that the said [*claimant*] is entitled to the said value of the household goods and furniture, under such execution as aforesaid, he the said [*plaintiff*] doth hereby undertake and agree to pay him the full value thereof, at a fair appraisement: *And* if the said arbitrator should determine that the said [*claimant*] had no right thereto; and that the said [*plaintiff*] is entitled to the same, the said arbitrator is to award and allow such damages to the said [*plaintiff*], to be paid by the said [*claimant*], as the said arbitrator shall deem reasonable: *And* the costs of the said arbitration, and of this agreement, and the reference and award, shall be paid by the party who shall be declared by the said arbitrator not to be entitled to the said household goods and furniture, or the value thereof; *So as* the said arbitrator shall make and publish his award in writing, ready to be delivered to the said parties, or either of them requiring the same, on or before the twenty-eighth day of November instant: *And* that the said parties shall, in all things, stand to, abide by, fulfil, and keep such award so to be made and published as aforesaid;" *As* by the said order, reference being thereto had, will, among other things, more fully appear.

and the claims referred to arbitrator;

if he should determine that claimant is entitled to the value, plaintiff undertakes to pay same;

if he should determine that plaintiff is entitled, arbitrator to award damages to plaintiff, to be paid by claimant;

costs of arbitration, &c., to be paid by him who shall be declared not to be entitled;

so as the award be made by a given day;

parties to abide by award.

Recital of enlargements of time.

And whereas by divers orders, made with the like consent, the time limited for me the said arbitrator to make my award in the premises, hath been from time to time duly enlarged.

Recital of last enlargement of time.

And whereas on the twenty-third day of December now last past, it was, by Sir John Richardson, knight, one of the Justices of his Majesty's said Court of Common Pleas, upon hearing the attornies or agents on both sides, and by and with their consent, *Ordered*, that the time for me the said arbitrator to make my award in the said cause should be enlarged until the first day of the then and now next Hilary Term.

Testatum.

Now know ye, that I the said [*arbitrator*], having taken upon myself the burthen of the said reference, and having heard, examined, and duly considered the allegations, vouchers, proofs, and witnesses of

the said parties respectively, and investigated the nature of their respective claims, in the said agreement mentioned, *Do* make and publish this my award in writing of and concerning the matters to me referred, as follows: that is to say; I do award and determine, that the said [*claimant*] hath not, nor had any right or title to the said household goods and furniture, or the value thereof; but that the said [*plaintiff*] was and is entitled to the same. And I do further award and allow to the said [*plaintiff*] one shilling damages, to be paid to him by the said [*claimant*]. In witness, &c.

UNDER JUDGE'S ORDER, ON AGREEMENT, OF RIGHT TO FURNITURE, AND DAMAGES.

Award, that claimant had no right to furniture, but that plaintiff was entitled: and that claimant pay plaintiff 1*s.* damages.

AWARD *under a* Judge's Order, *that a Cause in the King's Bench should be referred to Arbitration; that the Costs of the Cause, Reference, and Award, should be in the Arbitrator's Discretion; and that the Arbitrator might examine the Parties and Witnesses on Oath, to be sworn before a Judge of the Court, or a Commissioner:* That *the Defendant pay the Plaintiff, at, &c., a certain Sum: that it be received by the Plaintiff, in full satisfaction of all Matters referred: that each Party pay his own Costs of the Cause, and Reference; and that the Costs of the Award be paid equally.*

UNDER JUDGE'S ORDER, OF PAYMENT TO PLAINTIFF, &C.

To all to whom these presents shall come, I, [*arbitrator*], of the Inner Temple, Special Pleader, *send greeting.* Whereas an action was lately commenced in his Majesty's Court of King's Bench, in which [*plaintiff*] was plaintiff, and [*defendant*], gentleman, one of the attornies of the said Court, was defendant: And it was, on or about the 4th day of December now last past, by the Honourable Sir *William Draper Best,* knight, one of the Justices of the same Court, upon hearing the attornies on both sides, and by their consent, *Ordered* (amongst other

Exordium.

Recital of an action in K. B.

and of a judge's order, that the cause should be referred to arbitration:

UNDER JUDGE'S ORDER OF PAYMENT TO PLAINTIFF, &c.

things), that the said cause should be referred to the award, order, arbitrament, final end, and determination of me the said [*arbitrator*]; *so as* I should make and publish my award in writing, of and concerning the matters referred, ready to be delivered to the said parties in difference, or such of them as should require the same, on or before the twenty-third day of January instant: *And* that the said parties should in all things abide by, perform, fulfil, and keep such award, so to be made as aforesaid: *And* that the costs of the said cause, and the costs of the reference and award, should be in the discretion (*a*) of me the

that the parties should abide by the award;

that the costs of cause, reference, and award,

Power of arbitrator as to costs, when they are left to his *discretion*. When a cause is referred, he may award a gross sum, or costs to be taxed, or costs generally.

(*a*) When a cause is referred, and the costs are left to the *discretion* of the arbitrator, he may either award a *gross sum* to be paid for costs, *Shephard* v. *Brand*, Cas. temp. Hardw. 53; or he may award that one of the parties shall pay to the other *costs to be taxed by the master* or *prothonotaries*; *Winter* v. *Garlick*, 1 Salk. 75; 6 Mod. 195, *S. C. Pedley* v. *Goddard*, 7 Durnf. & East, 77; or he may award costs *generally*, in which case the master or prothonotaries shall tax them. *Dudley* v. *Nettlefold*, 2 Str. 737; *Perry* v. *Nicholson*, Say. Rep. 240; *Fox* v. *Smith*, 2 Wils. 267; *Stephenson* v. *Browning*, Barnes, 56; and see Hullock on Costs, 418, 419; *Candler* or *Chandler* v. *Fuller*, Willes, 62; Kyd. on Awards, 394, 2d ed. *S. C.* 2 Tidd's Practice, 863, 7th ed. And when an arbitrator, authorized to tax costs in a cause, has allowed an *item* which it is insisted ought not to have been charged, the Court of King's Bench will not refer it to the master. *Anon.* 1 Chit. Rep. 38. But he cannot award that one of the parties shall pay to the other such costs as two persons named in the award, but not officers of the court, shall appoint; for this is an improper delegation of his authority. *Nott* or *Knott* v. *Long*, Cas. temp. Hardw. 181, Lee's edit. 2 Str. 1025, *S. C.* And where, a special jury having been obtained on the motion of the defendant, the cause was referred; and, by the order of reference, the costs of the cause were to abide the event, and the costs of the reference and of the special jury were left in the discretion of the arbitrator; it was held, that the arbitrator could not, after directing a verdict for the plaintiff, award that the latter should pay the costs of the special jury: the Court thinking that the fair meaning of the submission was, that the arbitrator should have the power of allowing the costs of the special jury as costs in the cause, if the party who moved for the same were to succeed. *Finlayson* v. *M'Leod*, 1 Barnw. & Ald. 663.

But he cannot authorize any besides officers of the court to ascertain the costs.

Taxed costs must be as between party and party.

If, under a submission by rule of Court or order of *Nisi Prius*, an arbitrator award costs to be taxed by the master, such costs shall be taxed as between party and party, and not as between attorney and client. *Pratt*

said arbitrator: *And* that I, the said arbitrator, should be at liberty (if I should think fit) to examine the said parties to that suit, and their respective witnesses, upon oath, to be sworn before the said Sir William Draper Best, or some other judge of his Majesty's Court of King's Bench, or a commissioner duly authorized. Now know ye, that I the said [*arbitrator*], having taken upon myself the burthen of the said reference; and having heard, examined, and considered the allegations of the said parties and their respective witnesses, and the vouchers and proofs of the said parties respectively, *Do* make and publish this my award in writing, of and concerning the matters referred

should be in arbitrator's discretion; and that the arbitrator might examine the parties and witnesses on oath, to be sworn before a judge of the court, or commissioner. *Testatum.*

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v. *Salt*, Cas. temp. Hardw. 161, Lee's edit. And it is settled, that an arbitrator cannot, in such a case, award any other than the common costs, as between party and party, unless he be expressly authorized so to do. *Marder* v. *Cox*, Cowp. 127; *Southmead* v. *Northmore*, Cas. Prac. C. P. 69; *Durrant* v. *Kerr*, Ibid. 70; *Barker* v. *Timson*, 2 Wm. Bla. 953. So, upon a submission by bond of all matters in difference between the parties in a *cause*, without making any mention of *costs*, the arbitrator has no authority to award costs as between attorney and client. *Whitehead* v. *Firth*, 12 East, 165. But when there is no cause depending, and the reference is entirely the act of the parties, as there can be no taxation by an officer of the Court, costs as between attorney and client may be awarded. *Hartnell* v. *Hill*, Forrest. 79; *ante*, p. 10, n. (*c*).

When a cause is referred, the arbitrator can award no other costs, without authority;

But when there is no cause depending, he may award costs as between attorney and client.

And if arbitrators award the defendant to pay the plaintiff his costs, to be taxed by the proper officer before a particular day, it is the business of the *defendant* to have them taxed before that day; *Candler* v. *Fuller*, Willes, 62; *Bigland* v. *Skelton*, 12 East, 438; and if he do not, the *plaintiff*, it seems, may proceed to have them taxed. *Ex parte Sadler* v. *Robins*, 1 Campb. 255.

If defendant be ordered to pay costs, he should get them taxed by the day of payment.

Under a submission to arbitration of two assaults, for one of which the defendant had been indicted and convicted at the quarter sessions, and of all costs incident to the indictment and subsequent proceedings thereon, the arbitrator having awarded a payment in satisfaction of all costs incident to the indictment, and previous as well as subsequent proceedings thereon, &c., the Court of Common Pleas held, that he had not thereby exceeded his authority. *Baker* v. *Townshend*, 7 Taunt. 424; 1 Moore, 120, *S. C.* And on a submission to arbitration under an order of *Nisi Prius*, the arbitrator may award costs *subsequent* to the order; but where the submission is by bond, he cannot award subsequent costs, unless power be expressly given him for that purpose. *Carpenter* v. *Joynes*, Pr. Reg. 45; *Tynte* v. *Every*, Barnes, 58; *Hartnell* v. *Hill*, Forrest, 73; *ante*, p. 10, n. (*c*); and see *Wood* v. *O'Kelly*, 9 East, 436; *ante*, p. 109.

On referring a cause, the arbitrator may award costs *subsequent* to the order.

UNDER JUDGE'S ORDER, OF PAYMENT TO PLAINTIFF, &c.

Award that defendant pay plaintiff, at &c. a certain sum:

that it be received by plaintiff in full satisfaction of matters referred: that each party pay his own costs of cause and reference; and that the

to me as aforesaid, as follows: that is to say; I do award, order, and adjudge, that the said [*defendant*] shall and do pay, or cause to be paid, to the said [*plaintiff*], at the White Hart Tavern, opposite Chancery-Lane, in Holborn, on the twenty-seventh day of January instant, between the hours of twelve at noon and one in the afternoon, the sum of 7*l.* 3*s.* 6*d.*: And that the same shall be received by the said [*plaintiff*] in full satisfaction and discharge of and for all the matters in difference to me referred as aforesaid. And I do further award, order, and adjudge, that * each of the said parties shall and do bear and pay his own costs of the said cause and of this reference; *And* that the

The general term *costs* does not include the costs of *reference*.

If an arbitrator appointed under an order of *Nisi Prius*, only award costs to be taxed generally, the costs of the reference ought not to be allowed on the taxation, but merely the costs of the suit. *Bracher* v. *Cotton*, Barnes, 123; *Browne* v. *Marsden*, 1 Hen. Bla. 223. Nor will the general term *costs*, in the rule of reference, include the costs in that reference. *Bradley* v. *Tunstow*, 1 Bos. & Pull. 34; 7 Taunt. 213, *S. C.* Neither will an award that one party shall pay to the other the costs by him sustained in the action, include the costs of the reference. *Browne* v *Marsden*, 1 Hen. Bla. 223. [Where a cause was referred in which a verdict had been found for the defendant, and a rule for a new trial obtained, and the costs of the cause were to be in the discretion of the arbitrator, who awarded that the plaintiffs were entitled to recover, and that the defendants should pay the costs of the cause: it was held that the plaintiffs were not entitled to the costs of the first trial. *Rigby* v. *Okell*, 7 Barn. & Cress. 57.]

What held to be costs in the cause.

It is doubtful whether a direction to pay "the costs of the award" is void for uncertainty.

Where the arbitrator directs the payment of the costs of the *award* generally, without fixing the amount of them, it is doubtful whether the award is bad in that respect for uncertainty, or whether the amount may not be taxed by the officer of the Court. *Vide ante*, p. 10, n. (c).

When a cause goes off on an ineffectual arbitration, and is afterwards tried, costs are allowed as on a *remanet*.

When a cause goes off upon an ineffectual arbitration, and is afterwards tried, costs are allowed as upon a *remanet*. *Burchall* v. *Ballamy*, 5 Burr. 2694; Sayer on Costs, 179, 2d ed. *S. C.* *Sparrow* v. *Turton*, 2 Tidd's Prac. 864, 7th ed. Sayer on Costs, 178, 2d ed. *S. C.*: and see *Booth* v. *Atherton*, 6 Durnf. & East, 144: but the practice was formerly otherwise; see *Bracher* v. *Cotton*, Cas. Pr. C. P. 138; Pr. Reg. 103, *S. C.* The point does not appear to be affected by the subsequent cases of *Mason* v. *Skurray*, Doug. 438; *Hankey* v. *Smith*, 3 Durnf. & East, 507; *Smith* v. *Haile*, 6 Durnf. & East, 71; *Lickbarrow* v. *Mason*, Ibid. 131; *Rouse* v. *Bardin*, 1 Hen. Bla. 639; there not being in any of them a reference to arbitration.

When a cause is referred, the ar-

In general, the arbitrator does not name the fee to be paid to himself; it is more usual for the master to allow it, according to the circumstances of

costs of this my award be paid in equal moieties between them. IN WITNESS whereof, I the said arbitrator have hereto set my hand this twenty-third day of January, in the year of our Lord 1822.

costs of award be paid equally. *Testimonium.*

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the case. Caldw. on Arb. 77. *Vide ante*, p. 11. See further as to Costs, *ante*, p. 10, n. (*c*); p. 106, n. (*b*).

bitrator does not name his own fee.

[The late bankrupt act 6 Geo. 4, c. 16, has left untouched the law as to proving costs, where the bankruptcy ensues before judgment; and therefore, in a late case, where a verdict was entered for a plaintiff subject to an award, and the arbitrator awarded the costs of the reference to be paid by the plaintiff, who, after the verdict and before the award, became bankrupt, it was held that neither these costs nor the costs of the cause (which were to abide the event) were proveable under the commission, and consequently the bankrupt was not discharged from them by his certificate. *Haswell* v. *Thorogood*, 7 Barn. & Cress. 705.]

As to proving costs in bankruptcy.

AWARD *under a* JUDGE'S ORDER, *whereby a Cause was referred to one Arbitrator; the Costs of the Action to abide the Event of the Award; the Costs of Reference to be in Arbitrator's Discretion; the Parties and Witnesses to be examined on Oath, to be sworn before a Judge of the Court, or a Commissioner: the Parties to produce all Books, &c. and the Order to be made a Rule of Court;*—THAT *the Proceedings in the Cause shall cease: that the Defendant shall pay the Plaintiff, or his Attorney, a certain Sum, in full of all Demands in the Cause: That on Payment thereof, the Plaintiff shall, if required, at the Defendant's Costs, execute a General Release: and that the Plaintiff and Defendant shall each pay his own Costs of the Reference, and of the Award.*

UNDER JUDGE'S ORDER, OF PAYMENT, GENERAL RELEASE, &c.

TO ALL TO WHOM THESE PRESENTS SHALL COME, I [*arbitrator*], of &c., *send greeting.* WHEREAS by an

Recital of a judge's order,

UNDER JUDGE'S ORDER, OF PAYMENT, GENERAL RELEASE, &c.

order of the right Honourable Sir Charles Abbott, knight, Lord Chief Justice of his Majesty's Court of King's Bench, at Westminster, dated the —— day of —— last, and made in a certain cause then and now depending in the same Court, wherein [*plaintiff*] is plaintiff, and [*defendant*] is defendant, the said Chief Justice, upon hearing the attornies or agents on both sides, and by their consent, did *Order*, (amongst other things), that all matters in difference between the parties in the said cause should be referred to the award, order, arbitrament, final end, and determination of me the said [*arbitrator*]; *so as* I should make and publish my award in writing of and concerning the premises, on or before the —— day of —— then and now next: And, by the like consent, the said Chief Justice did *further order*, that the costs of the said action should abide the event of my award: *And* that the costs of such reference should be in the discretion of me the said arbitrator: And, by the like consent, the said Chief Justice *did further order*, that the parties, and their respective witnesses, might be examined upon oath, to be sworn before any judge of the Court of King's Bench, or a commissioner for taking affidavits in the said Court; *And* that the parties should produce before me, the said arbitrator, all books, papers, and writings in their custody or power, touching the matters in question; *And* that the said order should be made a rule of the said Court of King's Bench, if the same Court should so please; *As* by the said order more fully appears. Now know ye, that I the said [*arbitrator*], the arbitrator aforesaid, having taken upon me the burthen of the said arbitrament, and having heard, examined, and considered the allegations and proofs of both the said parties concerning the premises, *Do* thereupon make this my award in writing concerning the same, in manner following: that is to say; I do award, adjudge, and determine, that all further proceedings in the said cause shall henceforth cease and be no further prosecuted: And that the said [*defendant*] shall and do, on the —— day of —— instant, (*or* next), between the hours of —— and —— of the clock of the same day, well and truly pay, or cause to be paid unto the said [*plaintiff*],

whereby a cause was referred to one arbitrator,

so as, &c.

costs of action to abide event of award;

costs of reference to be in arbitrator's discretion: parties and witnesses to be examined on oath, to be sworn before a judge of Court, or commissioner: parties to produce all books, &c.

order to be made a rule of Court.

Testatum.

Award,

that proceedings in cause shall cease:

that defendant shall pay plaintiff, or his attorney, a certain sum, in full of all demands in cause:

UNDER JUDGE'S ORDER, OF PAYMENT, GENERAL RELEASE, &c.

or his attorney, Mr. ——, of ——, for the use (*a*), of the said [*plaintiff*], at ——, the sum of —— pounds of lawful money of Great Britain, in full of all demands in the said cause: And that, upon payment thereof, the said [*plaintiff*] shall, if required so to do by, and at the costs of, the said [*defendant*], execute and deliver to him the said [*defendant*], a general release in writing of all and all manner of action and actions, cause and causes of action, debts, duties, claims, and demands whatsoever, from the beginning of the world until the day of the date of the aforesaid order. And lastly, I do award and direct that each of them the said [*plaintiff*] and [*defendant*] shall and do bear and pay his own costs of the reference, and of this my award. In witness whereof, I the said [*arbitrator*], the arbitrator aforesaid, have hereunto set my hand the —— day of ——, 18—.

that, on payment thereof, plaintiff shall, if required, at defendant's costs, execute a general release;

and that plaintiff and defendant shall each pay his own costs of reference and of award.

Testimonium.

(*a*) On shewing cause against a rule which had been obtained, to set aside an award, on the ground that the money was awarded to be paid to a stranger, the Court were clearly of opinion, that an award directing payment to one person for the use of another was good; and though the party to receive the money did not appear to be invested with any express authority by the person for whom the money was to be paid, the award was nevertheless sufficient: and they said, that supposing the person to receive the money was a banker, it would do; and here it was to be paid for the *use* of one of the parties to the submission. It appeared from the affidavit, that the person was agent; and though it was urged that he was not invested with any agency for this purpose, yet the Court said, that circumstance made no difference. *Snook* v. *Hellyer*, 2 Chit. Rep. 43. But an award to pay money to a stranger is bad, although he be the attorney of the party, unless the award states it to be for the benefit of the party. *Buckhurst* v. *Mayo*, 1 Roll. Abr. 247, (E.), pl. 5. *Futrell* v. *White*, Dyer, 242 a, (51), in marg. *Ecclestade* v. *Maliard*, Cro. Eliz. 4. *Dudley* v. *Mallery*, cited 3 Leon. 62. *Bedam* v. *Clerkson*, 1 Ld. Raym. 123. *Bird* v. *Bird*, 1 Salk. 74. Com. Dig. *Arbitrament*, (E. 7).

An award that money shall be paid to a stranger, for the use of one of the parties to the submission, is good:

but if the award do not state it to be for his use, it is bad.

UNDER ORDER BY LORD CHANCELLOR, OF BALANCE OF ACCOUNT.

AWARD *by an Umpire, under an Order by the* LORD CHANCELLOR, *whereby a Chancery Cause was referred to the Solicitors for the Parties, who, in case of Difference, were to choose an Umpire;* THAT *the Balance due to the Defendant was* 348*l.*: *and* 200*l. having been paid him by the Plaintiff since the Order of Reference, that the Balance now is* 148*l.*

Exordium. TO ALL TO WHOM THESE PRESENTS SHALL COME, I [*umpire*], of Lincoln's Inn, barrister at law, *send greeting.* WHEREAS by a certain order, made by the Lord High Chancellor of Great Britain, on ——, the —— day ——, in the —— year of the reign of his present Majesty King George the Fourth, in a certain cause then depending in the High Court of Chancery, wherein [*plaintiff*] was the plaintiff, and [*defendant*] was the defendant, it was, by the consent of the said parties, and their counsel, *Ordered*, among other things, that all accounts should be settled between the said plaintiff and defendant, and the balance paid to the defendant immediately on such settlement, including the balance on a certain note of hand, and also the wages of the said defendant: and that the accounts between the said parties should be referred to Mr. [*arbitrator*], solicitor for the said plaintiff, and Mr. [*arbitrator*], solicitor for the said defendant, who, in case of differing, were to choose a third person. AND WHEREAS the said Mr. [*arbitrator*] and Mr. [*arbitrator*] did differ as to the said settlement of the said accounts; *And* did in consequence thereof choose and appoint me the said [*umpire*], to settle the same. AND I the said [*umpire*], having taken upon myself the settlement of the said accounts, and having heard and duly considered the allegations, vouchers, and proofs of the said parties, have settled the said accounts. AND do hereby award, adjudge, and declare, the balance due from

Recital of an order by the Lord Chancellor, whereby a Chancery cause was referred to the solicitors for the parties, who, in case of difference, were to choose an umpire.

Recital that arbitrators differed, and appointment of umpire.

Award that balance due to de-

the said plaintiff to the said defendant, upon such settlement, including the balance on the said note of hand, and the said defendant's wages, to be the sum of three hundred and forty-eight pounds. And it having been admitted before me, by the said solicitors of the said parties, that the sum of two hundred pounds has been paid by the said plaintiff to the said defendant, between the date of the said order and of this my award, as part of and towards the sum of money that might be found due on such settlement; I do further declare, that the sum now remaining due, to be paid by the said plaintiff to the said defendant, as the balance of the said accounts, is one hundred and forty-eight pounds. In witness, &c.

UNDER ORDER BY LORD CHANCELLOR, OF BALANCE OF ACCOUNT.

fendant was 348*l.*: and 200*l.* having been paid him by plaintiff since the order of reference,

that the balance now due is 148*l.*

AWARD, *under an Order of Reference, that the Plaintiff has no Claim on the* Assignees of a Bankrupt (*a*), *in respect of a certain Ship; or for any Monies lent the Bankrupt, or expended on the Ship: that the Plaintiff never had any Title to the Ship: that the Plaintiff shall on Demand deliver to the Assignees all Papers relating to the Ship: and that the Assignees permit the Plaintiff to prove a certain Sum under the Commission, as a Debt due from the Bankrupt.*

NO CLAIM ON BANKRUPT'S ASSIGNEES AS TO A SHIP, BUT PLAINTIFF TO PROVE A DEBT.

Now know ye, &c., I do award, adjudge, and declare, that the said [*plaintiff*] hath no claim or demand

Award that plaintiff has no claim on as-

[(*a*) By stat. 6 Geo. 4, c. 16, s. 88†, "the assignees with the consent of the major part in value of creditors who shall have proved under the commission, present at any meeting whereof and of the purport whereof twenty-one days' notice shall have been given in the *London Gazette*, may compound with any debtor to the bankrupt's estate, and take any reason-

Assignees, with consent of the major part in value of the creditors present, may submit disputes to arbitration.

[† As to the powers of assignees of *insolvents*, see stat. 7 Geo. 4, c. 57, s. 24, stated *ante*, Vol. 2, p. 626.]

signees in respect of a certain ship; or for any monies lent bankrupt, or expended on the ship; that plaintiff never had any title to the ship; that plaintiff shall, on demand, deliver to

whatsoever upon the said [*assignees*], as assignees as aforesaid, or either of them, for or in respect of a certain ship or vessel called the ——; or for or in respect of any monies lent or advanced to the said [*bankrupt*], the said bankrupt, or paid, laid out, or expended upon the credit of the said ship or vessel: *And* that the said [*plaintiff*] hath not, nor at any time whensoever had, any interest, right, title, claim, or demand whatsoever, in, to, or in respect of the said ship or vessel. And I do award, order, and direct, that the said [*plaintiff*] shall, upon demand,

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able part of the debt in exchange for the whole, or may give time or take security for the payment of such debt, or may submit any dispute between such assignees and any persons concerning any matter relating to such bankrupt's estate, to the determination of arbitrators to be chosen by the assignees and the major part in value of such creditors, and the party with whom they shall have such dispute; and the award of such arbitrators, shall be binding on all the creditors; and the assignees are hereby indemnified for what they shall do according to the directions aforesaid." And no suit in equity shall be commenced by the assignees without such consent as aforesaid: Provided that if one third in value or upwards of such creditors shall not attend at any such meeting (whereof such notice shall have been given as aforesaid), the assignees shall have power, with the consent of the commissioners, testified in writing under their hands, to do any of the matters aforesaid."

The creditors cannot give assignees a general power to refer; but the statute must be complied with in each case.

The creditors present at a meeting cannot give the assignees a general power for this purpose; but the assignees must have a meeting of creditors, upon notice given for that purpose in the London Gazette, to consider of each particular case for arbitration, before they can proceed to a reference. *Ex parte Whitchurch*, 1 Atk. 91.

A general reference to arbitration, by assignees of bankrupt is an admission of assets.

[A reference to arbitration of all matters in dispute by assignees of a bankrupt, and a consequent award to pay a sum of money, is conclusive upon them as to assets: for if they think fit to refer generally all matters in dispute to arbitration, without protesting against the reference being taken as an admission of assets, it will amount to such an admission. *Robson* v. ——, 2 Rose, 50.]

Trustees of insolvent debtor entering into arbitration bond, admit that they have assets, and may be directed to pay costs.

It has been held, that trustees of an insolvent debtor, by entering into an arbitration bond, confessed that they had sufficient funds; and by referring all matters in difference, and agreeing to pay what should be awarded, they had made themselves responsible for the payment of costs. *In re Wansborough & Wansborough* v. *Dyer*, 2 Chit. Rep. 40. As to a reference by an executor or administrator, on the same principle, *vide ante*, pp. 89, 90.

deliver up to the said [*assignees*], assignees as aforesaid, all papers and documents in anywise relating to, or otherwise concerning the title of the said ship or vessel, now in the possession, custody, or power of the said [*plaintiff*], or of any person for or on account of him the said [*plaintiff*]. And I do further award, order, and direct, that the said [*assignees*], as assignees as aforesaid, shall and do suffer and permit the said [*plaintiff*], to prove the sum of —— hundred pounds, and no more, under the commission of bankrupt against the said [*bankrupt*], as a debt due and owing from him the said [*bankrupt*] before his bankruptcy, to the said [*plaintiff*], and as the balance of mutual credit between them the said [*plaintiff*] and the said [*bankrupt*].

NO CLAIM ON BANKRUPT'S ASSIGNEES AS TO A SHIP, BUT PLAINTIFF TO PROVE A DEBT.

assignees all papers relating to the ship: and that assignees permit plaintiff to prove a certain sum under the commission, as a debt due from bankrupt.

AWARD *on a former Award being sent back to the Arbitrator for his Reconsideration* (*a*); *reciting an Order of* Nisi Prius, *whereby the Jury was ordered to find a Verdict for the Plaintiff, with Costs, subject to a Reference of all Matters in Difference in the Cause: that the Costs of the Cause should abide the Event of the Award: that the Costs of the Reference should be in the Arbitrator's Discretion: the*

CONFIRMING FORMER AWARD, SENT BACK FOR RECONSIDERATION.

(*a*) A rule having been obtained to shew cause why an award should not be set aside, on the grounds which appeared in the affidavit to support the motion; but on moving to make the rule absolute, the Court refused to grant the motion. Application was then made to the Court to let the matter go back again to the arbitrator, on an affidavit, that the party had procured new evidence since the reference. Mr Justice *Bayley* said, you should have applied to the arbitrator to delay making his award, and appoint another meeting to hear the additional evidence. It was answered by the counsel for the rule, that the evidence was not discovered till after the award was made. Mr. Justice *Abbott* said, that is not suf-

On an application to the Court to let the matter go back to the arbitrator, on the ground that the party had procured new evidence since the award, the affidavit should shew that it was such evidence as a reasonable di-

CONFIRMING FORMER AWARD, SENT BACK FOR RECONSIDERATION.

Order afterwards made a Rule of the Court of King's Bench: several Enlargements of the Time for making the Award: that the Arbitrator ordered the Defendant to pay the Plaintiff a certain Sum: a Rule calling on the Defendant to shew Cause why an Attachment should not issue against him for Non-performance of the Award: a Rule whereby the Rule to shew cause was enlarged, the Defendant consenting to go before the same Arbitra-

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**tor, who was to reconsider the Amount of Damages; so as the Sum then awarded should be invested in Exchequer Bills, and deposited at the Bank, in the Attornies' Names, and paid to the Plaintiff's Attornies, either wholly or partly, according to the second Award: Enlargement of the last Rule, and of the Time for making the Award: the Costs of the further Reference and award to be in the Arbitrator's Discretion;* CONFIRMATION OF FORMER AWARD: *the Exchequer Bills to be delivered to the Plaintiff's Attornies; and the Defendant to pay the Plaintiff's Attornies the Costs of the Second Reference and Award; such Costs to be first taxed.*

Exordium.

TO ALL TO WHOM THESE PRESENTS SHALL COME, I, [*arbitrator*], of the Inner Temple, Barrister at Law, *send greeting.* WHEREAS by a certain order, made at the sitting of *Nisi Prius*, held at Guildhall, in and for the city of

Recital of an order of *Nisi Prius*, whereby the

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ligence could not have obtained.

ficient; you must shew by affidavit what it was, as in the case of a new trial on the same ground, that there was some surprise, and that it was not such evidence as a reasonable man might anticipate. But Mr. Justice *Bayley* said, that it is not sufficient. The affidavit should go further, and shew that it was such evidence as a reasonable diligence could not have obtained. The rule was discharged. *Eardly* v. *Otley*, 2 Chit. Rep. 42.

Fraud in obtaining submission, no ground for setting aside an award; but may

A rule was refused to a motion to set aside an *award*, on the ground that the *submission* had been obtained by fraud; the application should have been to set aside the order making the submission a rule of Court. Where the submission has been obtained by fraud, and an action is

London, on Monday the 29th day of April, in the year of our Lord, 18—, before the Right Honourable Sir Charles Abbott, Knight, Lord Chief Justice of our Lord the King, assigned to hold pleas before the King himself, in a certain *cause then depending in the same Court, wherein [*plaintiff*] was plaintiff, and [*defendant*] was defendant; *It was ordered* by the Court, by and with the consent of the plaintiff

CONFIRMING FORMER AWARD, SENT BACK FOR RECONSIDERATION.

jury was ordered to find a verdict for the

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brought on the award, the fraud may be given in evidence under a plea of *non assumpsit*, or *nil debet*. *Sackett* v. *Owen*, 2 Chit. Rep. 39.

be given in evidence in an action on award.

Where counsel move to set aside an award in favour of his own client, on an affidavit of acknowledgment by the arbitrator and defendant, that a considerable sum had been by mistake omitted to be awarded to his client, the Court of King's Bench granted a rule *nisi*. *Anon.* 2 Chit. Rep. 44. And see *Henfrey* v. *Bromley*, 6 East, 309; *ante*, Vol. 2, p. 652. In *Rogers* v. *Dallimore*, 6 Taunt. 115, *S. C.* 1 Marsh. Rep. 474, the Court of Common Pleas, in a case similarly circumstanced, held, that a rule absolute might be pronounced either to set aside the award, or to send back the case to the same arbitrator, or to amend the award by altering it to the enlarged sum. In that case the latter course was adopted, in order to save further expense.

Rule granted to set aside an award, on application of party in whose favour it was made, it appearing that a sum had been omitted by mistake:

or the award may be sent back to the same arbitrator:

But, in ordinary cases, an application for either of these purposes must, it seems, even where the submission is by rule of Court in an action pending, be made within the time limited by the statute. *Rogers* v. *Dallimore*, 1 Marsh. Rep. 473; 6 Taunt. 114, *S. C.*; *Vide ante*, Vol. 2, p. 578. In *Zachary* v. *Shepherd*, 2 Durnf. & East, 781, where a cause had been referred, the Court held, that a motion that an award should be referred back to the same arbitrator to re-consider it, on the ground that he had not sufficient materials before him at that time, must be made before the last day of the next term after such award made, according to 9 & 10 Wm. III. c. 15, s. 2, although the arbitrator be not charged with corruption or undue means. But the Court is not limited by time from setting aside an award founded on a submission by rule of Court in an action pending, where there has been a plain mistake of the arbitrator, and the counsel for the plaintiff was instructed to move sooner, but from some circumstance he did not, although the application be not made in the term next after making of the award. *Rogers* v. *Dallimore, ut supra*. For the statute extends only to cases where the submission is by bond, or a written agreement of the parties. *Anderson* v. *Coxeter*, 1 Str. 301. *Dubois* v. *Medlycott*, Barnes, 55; *Synge* v. *Jervoise*, 8 East, 465; *Ansell* v. *Evans*, 7 Durnf. & East, 1; *ante*, Vol. 2, p. 578; the distinction being between cases where the reference is entered into by the original agreement of the parties,—the Court not being in possession of any cause between them,—

or the rule made absolute to amend the award, by altering it to the enlarged sum.

In ordinary cases, the Court will look to the limitation of time given by the statute, as a rule to guide their discretion as to the time of reviewing awards made under rules of Court.

plaintiff, damages 8000*l.* costs 40*s.*

subject to a reference of all matters in difference in the cause;

so as, &c.

tiff and defendant, their counsel and attornies, that the jury should find a verdict for the plaintiff, damages 8,000*l.* and costs 40*s.*; *Subject* to that order, and the award to be made pursuant thereto: *And* that all matters in difference in the said cause between the parties, should be referred to the award, order, arbitrament, final end, and determination of me the said [*arbitrator*]; *so as* I should make and

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in which case the Court could not interfere, except under the statute; and those cases where the aid of the statute is not necessary to give the Court authority. *Rogers* v. *Dallimore*, 1 Marsh. Rep. 472. For instance, the statute does not apply to awards made under the authority of a rule of Court made in an action pending: For those awards under orders of *Nisi Prius*, or of a judge at chambers, derive their authority only from the retrospective operation of the rule of Court which is afterwards made, and therefore they are awards under rules of Court. 6 Taunt. 114. *S. C.* Strictly speaking, therefore, it is an inaccurate expression to say that an award is made under a judge's order; for in fact it is to the subsequent rule of Court that it owes all its authority. And no order of a judge, whether made at *Nisi Prius*, or at chambers, is a ground for an attachment, unless made a rule of Court. [Even in references of this description the application to set aside the award must be made in the period allowed for a new trial, *i. e.* within the next Term after the delivery of the award, unless a reasonable excuse be shewn for the delay. *Rawsthorn* v. *Arnold*, 6 Barn. & Cress. 629. See also *Thompson* v. *Jennings*, 10 J. B. Moore, 110, where it was held that the application should be made within the first four days of the Term.]

Orders of reference at *Nisi Prius*, or of a judge at chambers, derive their authority from the subsequent rule of Court;

and they are no ground for attachment, unless made a rule of Court.

Rule discharged with costs on a frivolous application.

If motion for setting aside an award be made on slight grounds, the rule will be discharged with costs. *Snook* v. *Hellyer*, 2 Chit. Rep. 43.

In K. B. the objections intended to be insisted on must be stated in the rule.

Where a rule to shew cause is obtained in the Court of King's Bench, *to set aside* an award, the several objections thereto, intended to be insisted upon at the time of making such rule absolute, must be stated in the rule to shew cause. *Regula Generalis*, 4 Barn. & Ald. 539. [And the same practice obtains in the Common Pleas, though it is not inflexible. See *Dicas* v. *Jay*, 5 Bing. 281. It should also be stated, that the rule was made on reading the rule of Court, by which the cause was referred. *Christie* v. *Hamlet*, 5 Bing. 195. But where a cause and all matters in difference were referred to arbitration, and a motion was made to set aside the award, on the ground that the arbitrator had not decided upon certain matters in difference; it was held, that it was not necessary to state those matters in the rule; inasmuch as they were specified in the affidavit, upon which the rule was obtained. *Rawsthorn* v. *Arnold*, 6 Barn. & Cress. 629.]

CONFIRMING FORMER AWARD, SENT BACK FOR RE-CONSIDERATION.

publish my award in writing, of and concerning the premises in question, on or before the last day but one of Easter Term then next ensuing: *And* that the said parties should and would perform, fulfil, and keep such award, so to be made by me the said [*arbitrator*] as aforesaid: *And* that the costs of the cause should abide the event and determination of my said award: *And* that the costs of the reference should be in the discretion of me the said arbitrator, who should direct and award by whom, and to whom, and in what manner the same should be paid: *Which* said order was afterwards entered and made a rule of his Majesty's Court of King's Bench. AND WHEREAS, by reason of my being unable to make my award within the time limited by the said order, the time for making my award was, by certain rules of the said Court of King's *Bench, from time to time duly enlarged. AND WHEREAS, by a certain other rule of the said Court of King's Bench, made on Wednesday next after the Octave of the Purification of the Blessed Virgin Mary now last past, upon hearing counsel for the plaintiff and defendant; and by their consent; *It was ordered,* that the time limited for me, the said arbitrator, making my award between the said parties, should be further enlarged until the first day inclusive (*a*) of the then next term. AND WHEREAS, in compliance with the said order and rules, and in pursuance thereof, I the said arbitrator did, on the fifteenth day of April now last past, make and publish my award in writing of and concerning the matters to me referred, whereby (among other things), I ordered and directed a certain sum of money, therein mentioned, to be paid by the said defendant to the said plaintiff, at a certain time and place therein mentioned. AND WHEREAS, after the making and publishing of my said award, and after the time thereby limited for the payment of the money thereby awarded to be paid by the said defendant to the said plaintiff, it was, by a certain other rule of the said Court of King's Bench, made on the Friday next after the morrow of the Holy Trinity now last past, *Ordered,* that the defendant, upon

that parties should perform award;

that costs of cause should abide event of award;

that costs of reference should be in arbitrator's discretion;

order afterwards made a rule of K. B.

Recital of enlargement from time to time.

Recital of last enlargement.

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Recital of award, whereby arbitrator ordered defendant to pay plaintiff a certain sum.

Recital of a rule, calling on defendant to shew cause why an attachment should not issue against him for non-performance of the award.

(*a*) *Vide ante*, p. 43, n. (*b*).

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notice of that rule to be given to him, should, upon Wednesday next after the Octave of the Holy Trinity, shew cause why a writ of attachment should not issue against him for his contempt, in not paying the sums of 3,535*l.*, and 546*l.* 0*s.* 10*d.*, pursuant to a certain rule and *allocatur* therein mentioned, and to my said award. AND WHEREAS by a certain other rule of the said Court of King's Bench, made on Thursday next after the Octave of the Holy Trinity now last past, *It was ordered*, that the said rule be enlarged until the last day but two of the then Trinity Term, the defendant thereby consenting to go before the same arbitrator, who was to re-consider the amount of the damages; so as the sum then awarded should be invested in Exchequer bills, and deposited in the Bank of England within a week then next ensuing, in the names of the attornies in the cause for both parties: *And* that the same should be paid out (either in the whole or such part as should be awarded), upon such award being made, to the attornies for the plaintiff. AND WHEREAS, by a certain other rule of the said Court of King's Bench, made on Monday next after three weeks of the Holy Trinity now last past, *It was ordered*, that the rule made in the said cause on Friday next after the morrow of the Holy Trinity, in the then Trinity Term, should be further enlarged until the first day of the then next Michaelmas Term: **And* that I the said arbitrator should have until three weeks after the end of the then Trinity Term to make my award: *And* that the costs of the further reference and award should be in my discretion. NOW KNOW YE, that I the said arbitrator, having re-considered the amount of the damages, in pursuance of the said rule for that purpose made, and having heard and duly considered the allegations, proofs, and witnesses of the said parties relating thereto, do hereby declare, that I see no reason to alter the amount of the damages: *And* I do therefore hereby confirm my said former award. AND I do order and direct the several Exchequer bills, and other securities wherein the money was invested, in pursuance of the said rule in that behalf, to be forthwith delivered over to the attornies for the said plaintiff. AND I do further award, order, and direct, that the said defendant shall and do pay

Recital of rule, whereby the rule to shew cause was enlarged, defendant consenting to go before the same arbitrator, who was to re-consider amount of damages; so as the sum then awarded be invested in Exchequer bills, and deposited at the Bank, in attornies' names; and paid to plaintiff's attornies either wholly or partly, according to second award.

Recital of enlargement of last rule;

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and of time to make award: costs of further reference and award to be in arbitrator's discretion.

Testatum.

Confirmation of former award

The Exchequer bills to be delivered to plaintiff's attornies:

and defendant to pay plaintiff's attornies costs of second reference, and award;

to Messrs. [*attornies*], the attornies for the said plaintiff, on behalf and for the use (*b*) of the said plaintiff, within one week next after notice in writing for that purpose given to the said defendant, or left at his usual place of abode, or at the office of his attorney, Mr. [*attorney*], the costs and expenses of this second reference, and of stamping and writing this my further award; such costs and expenses to be first taxed (*c*) by the proper officer of the said Court of King's Bench. In witness, &c.

CONFIRMING FORMER AWARD, SENT BACK FOR RE-CONSIDERATION.

such costs to be first taxed.

(*b*) *Vide ante*, p. 138, n. (*a*). (*c*) *Vide ante*, p. 133, n. (*a*).

[*149]

DEED OF COVENANTS *by a Lessee, in pursuance of an Award (a) to farm during the Remainder of a Term according to the* Course of Husbandry *mentioned in a Schedule: and every Year during the Remainder of the Term to feed off at least Sixty Acres of Meadow or Pasture Ground; and at the End of the Term, to leave the Lands directed in the Schedule to be left in Turnips, in an Husbandry-like Manner, sown with Turnips, twice properly hoed; the Lessee being paid for the same at the Valuation of two Referees, or their Umpire: and at the End of the Term, to leave all the Hay which shall arise in the last Year of the Term properly stacked; the Lessee being paid for*

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(*a*) The above deed is made pursuant to the direction, p. 29, of the award, *ante*, p. 25.

Reference to forms on which the above deed is founded.

See the submission on which the award is founded, *ante*, Vol. 2, p. 615.

But, in relation to the forms alluded to, it must always be remembered that they are adapted to a common reference by landlord and tenant, or by a receiver duly authorized to make such a submission. For a Chancery receiver has no authority to do it, without the direction of the Court. *Vide ante*, Vol. 2, p. 426, n. (*l*). Nor has a receiver appointed by a deed, unless such a power be expressly given to him. *Vide ante*, Vol. 2, p. 412, n. (*b*).

A Chancery receiver cannot submit breaches of lease without the Court's order; nor a receiver by deed, unless he has an express power.

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the same at the Valuation of two Referees, or their Umpire; during the Remainder of the Term, to keep all the Covenants of the Lease (except such as are altered by these Presents); and in every respect to perform the Award: and to perform all such Acts, and make all such Payments, as are thereby directed to be done and made by him.

Parties.

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THIS INDENTURE, made the —— day of ——, *in the year of our Lord 18—. BETWEEN [*lessee*], of —— in the county of ——, farmer, of the one part; and [*receiver*], the younger, of ——, in thesame county, gentleman, of the other part. WHEREAS by indenture of lease, bearing date on or about the —— day of ——, 18—, and expressed to be made between [*lessor*], esquire, since deceased, of the one part; and the said [*lessee*], of the other part; the said [*lessor*] did demise and let, &c. (*Recite the remainder of the lease, ut ante*, Vol. 2, p. 616.)

Recital of a lease of a farm.

Recital of an award by three arbitrators.

AND WHEREAS by a deed poll, or instrument in writing, under the hands and seals of [*arbitrator*], of —— in the said county of ——, farmer; [*arbitrator*], of ——, in the same county, farmer; and [*other arbitrator*], of ——, in the said county, farmer, and bearing date on or about the —— day of —— now last past; *After reciting* as or to the effect hereinbefore recited; *And also reciting* the death of the said [*lessor*], and an appointment of the said [*receiver*], to be the receiver of the rents and profits of his real estate, and, as part thereof, of the hereditaments demised by the said indenture of lease therein and hereinbefore recited; *And also reciting*, that the said [*lessee*] had not farmed or cultivated the arable lands, part of the said farm and hereditaments so demised to him as aforesaid, according to the course prescribed by the said therein and hereinbefore recited covenant (which is called the six years' course of husbandry); the said [*lessor*] having in his life-time, as he the said [*lessee*] alleged, agreed to dispense with the said covenant, and to permit the said [*lessee*] to farm the said lands, in the course of husbandry called the four years' course; *And further reciting*, that the said [*receiver*], allowing to the said [*lessee*] the full benefit of

the permission so stated to have been given to him as aforesaid, alleged, that the said [*lessee*] had not farmed or cultivated the said lands according to the said four years' course of husbandry; that he had done, or omitted to do, divers acts, matters, and things, contrary to, and in breach of the other covenants, conditions, and agreements contained in the said indenture of lease; whereby the lands so demised to him as aforesaid had sustained great damage; and that in consequence of such breaches, or alleged breaches, of such covenants as *aforesaid, the said [*receiver*] had threatened to commence an action of ejectment against the said [*lessee*], for the recovery of the possession of the said premises; *And also reciting*, that, in order to prevent such action as aforesaid, the said [*lessee*] had proposed to the said [*receiver*], and the said [*receiver*] had consented and agreed, that it should be referred to the said [*three arbitrators*], or any two of them, to settle and determine by their award, whether any and what damage had been occasioned to the said farm and hereditaments by reason of the matters aforesaid; *And also* to determine by their said award, what sum or sums of money (if any) should be paid by the said [*lessee*] to the said [*receiver*], as a compensation for such damages; *And also* to direct, by their said award, in what order, course, and manner the said premises should be farmed during the remainder of the said term of twenty-one years; *And* what agreements or other assurances should be made or executed by the said [*receiver*] and [*lessee*], or either of them; *And also reciting*, that, in pursuance of the said agreement, the said [*receiver*] and [*lessee*] had become bound to each other, by their several bonds or obligations in writing, bearing date on or about the —— day of —— last, to stand to, obey, observe, perform, fulfil, and keep the award and determination of the said [*three arbitrators*], which they, or any two of them should make, of and concerning the several matters and things so agreed to be referred to them as aforesaid; *And* to pay such sum and sums of money, and to make and execute such agreements, or other assurances, as the said arbitrators, or any two of them, should, by their said award, order, direct, or appoint; *The* said [*three arbitrators*] *did*, by the now recit-

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that lessee

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ing deed or instrument in writing, award, order, adjudge, and determine, *That* the said [*lessee*], his executors, administrators, or assigns, should pay to the said [*receiver*] the sum of —— hundred and —— pounds, as a full compensation and recompense for the damage which they found and determined to have been occasioned to the said farm and hereditaments, in consequence and by reason of the said [*lessee*] having, since the —— day of ——, 1811, farmed or otherwise managed the same contrary to the said four years' course of husbandry; and in * consequence and by reason of the breaches by the said [*lessee*], of the covenants and agreements in the said lease contained (except the said covenant to farm in the six years' course of husbandry); *And* they did thereby also award, that the costs and charges of the said bonds or obligations, and of and attending, or incident to, the said reference, arbitration, and award, (which they did assess at the sum of —— hundred and —— pounds —— shillings and —— pence in the whole) should be paid by the said [*lessee*]; *And* that the said sum of —— hundred and —— pounds, the amount of such damages as aforesaid, and the sum of —— hundred and —— pounds —— shillings and —— pence, the amount of such costs, charges, and expenses as afore said, should be paid by him the said [*lessee*] to the said [*receiver*]; as to the sum of —— hundred pounds, part of the said sum of —— hundred and —— pounds, and the said sum of —— hundred and —— pounds —— shillings and —— pence, the amount of such costs, charges, and expenses, on the —— day of —— then next ensuing; and as to the sum of —— hundred and —— pounds, residue of the said sum of —— hundred and —— pounds, on the —— day of ——, 18—; *And* that the said [*lessee*] should thenceforth, for and during all the then remainder of the said term of twenty-one years so granted to him by the said recited indenture of lease, farm, cultivate, and manage the said lands and hereditaments, as well pasture as arable, in the manner, according to the course, and with the succession and alteration of crops particularly mentioned, expressed, and declared in the schedule for that purpose prepared and settled by them, and annexed to and to be considered as part of, their said award; and a

should pay receiver a certain sum, for damages, by reason of having farmed contrary to the four years' course of husbandry, and of breaches of covenants in lease;

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that costs of arbitration bonds, reference, and award, should be paid by lessee:

that part of the damages, and the whole of the costs, should be paid to receiver on a certain day:

and the residue of the damages on a subsequent day:

that lessee should, for remainder of term, farm according to the course mentioned in schedule:

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copy of which said award is added to or annexed to these presents: *And* they did thereby lastly award, order, adjudge, and determine, that the said [*lessee*] should, at his own expense, and on or before the —— day of —— then next, enter into a deed of covenants with the said [*receiver*], to farm, cultivate, and manage the said lands and hereditaments accordingly. NOW THIS INDENTURE WITNESSETH, that in pursuance of, and in obedience to, the said recited award, *He* the said * [*lessee*] *doth* hereby for himself, his heirs, executors, and administrators, covenant and agree with the said [*receiver*], his executors and administrators, that he the said [*lessee*], his executors or administrators, shall and will, during the remainder of the said term of twenty-one years, granted by the hereinbefore in part recited indenture of lease, farm, cultivate, and manage, in a good and husbandry-like manner, the several pieces or inclosures of arable and pasture land belonging to the said farm, in such order and course, and with such succession and alterations of crops, and in every respect in such manner, as in the said schedule to the said award, and to these presents, is laid down, mentioned, and directed: AND ALSO, that he, the said [*lessee*], his executors or administrators, shall and will yearly and every year, during the remainder of the said term of twenty-one years, feed off at least sixty acres of the meadow or pasture ground demised by the said in part recited indenture of lease; *And* shall and will, at the expiration of the said term of twenty-one years, leave and yield up such of the lands mentioned in the said schedule as are thereby directed to be left in turnips in the last year of the said term (being the year 18—), in a good and husbandry-like manner, summered and sown with turnip seed; and the turnips arising from which shall have been twice properly hoed; the said [*lessee*], his executors or administrators, being paid or allowed by the person or persons entitled to the said hereditaments in remainder or reversion, expectant upon the determination of the said term of twenty-one years, or his or their in-coming tenant or tenants, such a sum of money as such turnips shall be valued at, within seven days after the determination of the said term, by two indifferent persons, one of them to be chosen by the said

and that lessee should, at his own expense, enter into a deed of covenant with receiver to farm accordingly.

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Testatum. Covenant by lessee with receiver, to farm during the remainder of term according to the course mentioned in the schedule:

and every year during remainder of term to feed off at least 60 acres of meadow or pasture ground;

and at the end of term to leave lands directed in schedule to be left in turnips, in husbandry-like manner, sown with turnips, twice properly hoed; lessee being paid for same at the valuation of two referees, or their umpire:

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[*receiver*], his executors, administrators, or assigns, and the other of them by the said [*lessee*], his executors or administrators; or if such two indifferent persons should not agree in their valuation thereof, then by one indifferent person, to be chosen by them: AND ALSO, that he the said [*lessee*], his executors or administrators, shall and will, at the expiration of the said term of twenty-one years, leave and yield up unto the said [*receiver*], his executors, administrators, or assigns, all the hay which shall * grow or arise upon or from the said demised premises, in the last year of the said term, in a proper manner, stacked in the stack yards belonging thereto; he the said [*lessee*], his executors or administrators, being paid or allowed for the same, by such person or persons as aforesaid, so much money as such hay shall be ascertained to be worth within seven days after the expiration of the said term, by two such indifferent persons, or their umpire, as shall be chosen to value the last year's turnips as hereinbefore expressed: AND ALSO, that he the said [*lessee*], his executors and administrators, shall and will, yearly and every year during the remainder of the said term of twenty-one years, well and truly observe, perform, and keep all the covenants, provisoes, and agreements contained in the said in part recited indenture of lease (save and except such of them as are in any wise altered or varied by these presents); AND ALSO shall and will stand to and in every respect obey, perform, observe, and keep the said award of the said [*three arbitrators*]; AND do and perform all such acts, matters, and things, and make all such payments, as are thereby ordered and directed to be made, done, and performed by the said [*lessee*], his executors or administrators, at the time or times thereby appointed for the making or doing of the same. IN WITNESS, &c.

and at the end of term, to leave all the hay which shall arise in the last year of term, properly stacked;

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lessee being paid for the same at the valuation of two referees, or their umpire;

during remainder of term, to keep all the covenants of lease (except such as are altered by these presents);

and in every respect to perform award; and to perform all such acts, and make all such payments, as are thereby directed to be done and made by him.

RELEASE (*a*) *by a Mortgagee to a Mortgagor, of* ALL ACTIONS AND DEMANDS, *pursuant to the Direction of an Award; excepting a Warrant of Attorney, directed by the Award, to be given by the Mortgagor to the Mortgagee.*

RELEASE OF ALL DEMANDS EXCEPT WARRANT OF ATTORNEY.

KNOW ALL MEN BY THESE PRESENTS, *That* I [*mortgagee*], of —— in the county of ——, mercer, *have* remised, released, and for ever quitted claim, *and* by these presents *do* remise, release, and for ever quit claim, unto [*mortgagor*], of ——, in the said county, gentleman, his heirs, executors, and administrators, *All* actions, cause and causes of action, judgments, suits, controversies, trespasses, debts, duties, damages, accounts, reckonings, and demands whatsoever, for or by reason of any matter, cause, or thing whatsoever, from the beginning of the world to the —— day of —— last; *save and except* a certain warrant of attorney, directed to be executed to me by the said [*mortgagor*], in and by a certain award, made this —— day of ——, 18—, by [*arbitrator*], esquire, of &c., barrister at law, on a reference to him of all disputes between me and the said [*mortgagor*]. IN WITNESS whereof, I have hereunto set my hand and seal, the —— day of ——, in the year of our Lord 18—.

Release by mortgagee to mortgagor, of all actions and demands;

excepting a warrant of attorney, directed by award to be given by mortgagor to mortgagee.

Testimonium.

SIGNED, SEALED, AND DELIVERED, (being first duly stamped (*b*),) in the presence of

Attestation.

(*a*) This release is made pursuant to the direction in the award, *ante*, p. 58.

Award

(*b*) Stamp one pound fifteen shillings; progressive duty one pound five shillings. 55 Geo. 3, c. 184. Sched. Part 1, title, DEED.

Stamp

RELEASE OF ALL DEMANDS EXCEPT RIGHT TO REDEEM.

RELEASE (*a*) *by a Mortgagor to a Mortgagee, of* ALL ACTIONS AND DEMANDS, *pursuant to the Direction of an Award; excepting his Right to redeem, in the Manner prescribed by the Award.*

Release by mortgagor to mortgagee, of all actions and demands;

KNOW ALL MEN BY THESE PRESENTS, *That* I [*mortgagor*], of —— in the county of ——, gentleman, *have* remised, released, and for ever quitted claim, *and* by these presents *do* remise, release, and for ever quit claim, unto [*mortgagee*], of ——, in the said county, mercer, his heirs, executors, and administrators, *All* actions, cause and causes of action, judgments, suits, controversies, trespasses, debts, duties, damages, accounts, reckonings, and demands whatsoever, for or by reason of any matter, cause, or thing whatsoever, from the beginning of the world to the —— day of —— last; *save and except* my right to redeem a certain farm, now in mortgage to the said [*mortgagee*], at the time, under the terms, and in the manner, prescribed in and by a certain award, made the —— day of ——, in the year ——, by [*arbitrator*], esquire, of &c. barrister at law, on a reference to him of all disputes between me and the said [*mortgagee*]. IN WITNESS, &c. *(ut ante*, p. 155.)

excepting his right to redeem in the manner prescribed by award.

Award.

(*a*) This release is made pursuant to the direction in the award, *ante*, p. 58.

BANKRUPTCY.

For BANKRUPTCY, *see title* TRUSTS FOR CREDITORS.

BARGAIN AND SALE FOR A YEAR.

LEASE AND RELEASE.

Origin of the conveyance by lease and release.

The form of the conveyance by lease and release is originally derived to us from the common law; and it is necessary to distinguish in what respect it operates as a common-law conveyance, and in what it operates under the statute of uses. At the common law, where the usual mode of conveyance was by feoffment with livery of seisin, if there were a tenant in possession, so that livery could not be made, the reversion was granted, and the tenant attorned to the reversion. As by this mode the reversion or remainder of an estate might be conveyed without livery when it depended on an estate previously existing, it was natural to proceed one step further, and to create a particular estate for the express and sole purpose of conveying the reversion; and then, by a surrender or release, either of the particular estate to the reversioner, or of the reversion to the particular tenant, the whole fee vested in the surrenderee or releasee. It was afterwards observed, that there was no necessity to grant the reversion to a stranger; and that, if a particular estate were made to the person to whom it was proposed to convey the fee, the reversion might be immediately released to him; which release, operating by way of enlargement, would give the releasee the fee. In all these cases, the particular estate was only an estate for years; for, at the common law, the ceremony of livery of seisin is as necessary to create an estate of freehold, as it is to create an estate of inheritance. Still, an actual entry would be necessary on the part of the particular tenant; for, without actual possession, the lessee is not, at common law, capable of a release, operating by way of enlargement. Butl. n. Co. Litt. 271 b; Litt. sec. 459. *Lutwich* v. *Mitton*, Cro. Jac. 604. For, before entry, the lessee has but *interesse termini*, an interest of a term, and no possession, and therefore a release which enures by way of enlarging an estate created by a lease at common law, cannot work without a possession; for before possession there is no reversion. But to the validity of a release at common law, it is not necessary that the estate to *be enlarged should be actually in possession; but only that it should be a *vested* estate, severed from the reversion. For Lord *Coke* says, that, if a man make a lease for years, the remainder for years, and the first lessee enters, a release to him in *remainder* for years, is good to enlarge his estate. Co. Litt. 270 a, (3).

Actual entry by the lessee is necessary previous to a release at common law.

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But a bargainee under the statute of uses, has a vested estate, and is capable of a release in enlargement without entry.

However, this necessity of entry for the purpose of obtaining the possession, was superseded, or made unnecessary, by the statute of uses: for, by that statute a vested right to the possession was immediately transferred to the *cestui que use;* so that, a bargainee under the statute has a vested estate, and is as capable of a release before or without entry, as a lessee is at the common law after entry. And a bargainee for years has, by the instantaneous operation of the statute, an actual vested estate, even although the bargain and sale be by a mere writing neither indented nor enrolled, because the statute of enrolments does not extend to leases for years. 2 Inst. 671; *Heyward's* case, 2 Co. 36; *Foxe's* case, 8 Co. 94. All, therefore, that remained to be done, to avoid, on the one hand, the necessity of livery of seisin from the grantor; and, on the other, the necessity of an actual entry on the part of the grantee, was, that the particular estate (which, for the reasons above mentioned, should be an estate for years) should be so framed, as to be a bargain and sale within the statute. This mode of conveyance by bargain and sale, and a release in enlargement, was first practised and contrived by Sir Francis *Moore*, serjeant at law, at the request of Lord *Norris*, in order that some of his relations might not know what settlement he had made of his estate. Phillips on Capias and Process of Outlawry, 115; Barrington on the Ancient Statutes, 133, 5th ed.; 2 Bla. Com. 339. Originally, it was made in such a manner as to be both a lease at the common law, and a bargain and sale within the statute. But, as it is held, that, where conveyances may operate both by the common law, and statute, they shall be considered to operate by the common law, unless the intention of the parties appears to the contrary, it became the practice to insert among the operative words, the words *bargain and sell* (in fact, it is more accurate to insert no other operative words), and to express that the bargain and sale, or lease, is made to the intent and purpose, that thereby, and by the statute of uses, the lessee may be capable of receiving a release. 4 Bac. Abr. 185, Gwill. ed. *Leases* (M). The bargain and sale, therefore, or the lease for a year, as it is generally called, operates, and the bargainee has a vested estate, by the statute, divided from the reversion; but he cannot bring an action of trespass without entry and an actual possession. *Barker* v. *Keat*, 2 Mod. 251; **Lutwich* v. *Mitton*, Cro. Jac. 604; [5 Bac. Abr. 696, Gwill. ed. *Release*, (C). 4;] Shep. Touch. 223. For, although the bargainee be possessed of an *estate* in the land, yet he is not in possession *of the land*, until he has entered by virtue of the bargain and sale. Therefore, the usual expression, in the bargain and sale, and in the release, "in the actual possession," is not strictly correct, unless by possession be meant only estate. For the bargain and sale cannot, by its own operation, give the bargainee the actual possession; it only gives him an actual estate, and a right to the possession. 2 Pres. Conv. 390, 445; *ante*, Vol. 2, p. 98. The release operates by enlarging the estate of the bargainee to a fee: this is at

"Bargain and sell" alone, are the proper [operative] words in a bargain and sale for a year, [to take effect under the statute of uses.]

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The expression that the bargainee is "in the actual possession," is not strictly correct.

common law; and if the use be declared to the releasee in fee simple, it continues an estate at the common law; but if the use be declared to a third person, the statute again intervenes, and annexes or transfers the estate or right to the possession in the releasee, to the use of the person to whom the use is declared. Butler's Fearne, 417. It has been said, that the possession of the bargainee, under the lease, is not so properly merged in, as enlarged by, the release: but, at all events, it does not, after the release, exist distinct from the estate passed by the release.

If the use be declared to the releasee in fee, it is an estate at common law.

As the operation of a bargain and sale and release depends upon the bargain and sale, the bargainor must be a person capable at law of being seised to an use; for, otherwise, the release will be void for want of an estate in the releasee. By some very respectable authorities, it has been said that a corporation cannot be seised to an use. Pop. 72; 1 Co. 127 a; Bacon on Uses, 57, 42; Plowd. 102, 538; Jenk. Cent. 195; 2 Vern. 399; Gilb. Uses, 5, 170, 285; Shep. Touchs. 508; [Lord Holt's Argument, in *Attorney General* v. *Mayor of Coventry* and others, 3 Madd. Rep. 356] A contrary doctrine, so far as relates to the conveyances of corporations by bargain and sale, seems to be laid down in Sir *Thomas Holland* v. *Bonis*, 1 Leon. 183; 2 Leon. 121; 3 Leon. 175; and see 13 H. 7, fol. 9, pl. 5; Butl. n. Co. Litt. 271 b. And the better opinion seems to be, that, although on a conveyance to a corporation a use cannot arise on their seisin to the use of others, yet that a corporation may create a use out of their own seisin by bargain and sale, either in fee or for years, and that the statute will transfer or turn the use so created into a vested estate; or, in simpler language, they may convey their own estates by a conveyance operating under the statute of uses. Sug. Gilb. Uses, liii—iv, 8, 10; Com. Dig. *Bargain and Sale*, (B. 3). But upon a conveyance *by* a corporation, to obviate any doubt, the conveyance is made by feoffment with livery of seisin, or by a lease at common law, whereupon an actual entry is made, followed by a release. Either of these modes avoids the question on the statute; the last as well as the first operates purely at common law; for * the lease (which should not contain the words *bargain and sell*, but *grant and demise*) has simply a common law operation, and after the lessee has actually entered, he is capable of a release enuring by way of enlargement, and entirely independent of the statute. A stranger may be made the lessee and releasee in the same way as in the case of a conveyance under the statute, and uses may be declared of his seisin just as if the conveyance had been made by a person capable of standing seised to a use. The declaration at the end of the lease for a year, instead of being in the common form, should be to the effect, that the demise is made "to the intent, that, by virtue of these presents, and *an entry* to be made by force of the grant or demise hereby made, the said [*grantee*] may be in the actual possession," &c. And on the lease a memorandum of the entry should be made. 2 Pres. Conv. 258, 446. See the forms *post*, p. 175,

On a conveyance *to* a corporation, a use cannot arise on their seisin to the use of others; yet it seems, a corporation may create a use out of their own seisin by bargain and sale:

but to avoid doubt on this point, corporations convey by feoffment, or lease and release at common law.

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178. The usual reference in the release to the bargain and sale for a year, and the statute, should be omitted, and in lieu of it should be inserted a reference to the lease for a year, under which it should be stated that the lessee is in actual possession by force of an entry made subsequently to its execution, but previously to the execution of the release. Sug. Gilb. Uses, 8. See the usual form of the RELEASE, *post*, title PURCHASE.

A lease and release, [or a bargain and sale, or a covenant to stand seised, will] not create a discontinuance, or a forfeiture,

or destroy a contingent remainder,

or a power in gross, appendant, or appurtenant.

A conveyance by lease and release, is, like a bargain and sale, and covenant to stand seised, what is termed an innocent conveyance. It will not, therefore, create a discontinuance; Litt. s. 598, 606; *Machel* v. *Clarke*, 2 Ld. Raym. 778; or operate as a forfeiture; Litt. s. 600; *Saunders* v. Lord *Annesley*, 2 Scho. & Lefr. 99; or destroy a contingent remainder, Fearne, 246, 3d ed.; although it may exclude a contingent remainder, by uniting the particular estate with the reversion; Sug. Gilb. Uses, 232; Butler's Fearne, 322: nor will it operate as a destruction of a power in gross; *Phitton's* case, cited Hard. 412; Sug. Pow. 61, 3d ed.; or a power appendant or appurtenant. *Long* v. *Rankin*, *ante*, Vol. 2, p. 313.

In practice the lease and release are always separate deeds.

The lease and release are at this day always separate deeds; but it is said that they *may* be contained in the same deed; for *North*, C. J. said, that he *had known it ruled several times*, that a lease and release in the same deed was a good conveyance, for priority should be supposed. 1 Freem. 251; Sug. Gilb. Uses, 229; 2 Pres. Conv. 366.

Reversion and remainder.

As to the conveyance of a reversion or remainder in fee, by lease and release, *vide ante*, Vol. 2, p. 96, n. (*a*).

Estates lying in grant pass by grant alone.

The proper mode of conveying rent charges, tithes, advowsons, and other estates lying in grant, is by grant at common law: Shep. Touch. 230: nor is it usual, when they are conveyed separately from other property, to use

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any other *mode of assurance. 2 Pres. Conv. 235. They may, however, be effectually conveyed by lease and release. 2 Sand. Uses, 26, 3d ed.

LEASE FOR A YEAR.

The date and execution.

The lease for a year is generally dated on the day next before the day of the date of the release. It is ordinarily also executed by each person, grantor in the lease, before the execution by that person of the indenture of release grounded on the lease. This is the correct practice, and should be observed as closely as circumstances will admit. The material point is, that the lease for a year should give a *vested* estate, capable of enlargement, and be subsisting, at least in legal intendment, as a vested estate, prior to the execution of the deed of release. This is evident from the preliminary observations. Of course no objection can arise from the circumstance that the lease for a year is dated at a more distant period than one day prior to the date of the release. Sometimes, indeed, even in modern practice, there is an interval of a day between the day of the

date of the lease, and the day of the date of the release, instead of having the lease and release dated on successive days. This happens from the caution of not dating the lease or release on a Sunday. But a deed dated, or even executed, on a Sunday, is binding, and free from all well-founded objection. The statute for the better observance of the Lord's day, 29 Car. II. chap. 7, applies to process and proceedings of the Courts, and dealings in the course of trade, and not to the private transactions of individuals, as between themselves, by way of conveyance without the interposition of the Courts, as in the case of fines and recoveries; transactions which are invalidated by the rules of the common law, when they appear to have taken place on a Sunday, for *dies dominicus non est juridicus*. Wingate's Maxims, 7; Noy's Maxims, 2; Co. Litt. 135 a; 2 Saund. 291.

Conveying parties.

All persons who are to convey any estate, and could not convey that estate at the common law without livery of seisin, must necessarily be lessors or grantors in the lease. This instance may be understood as that alone in which there is any absolute occasion for a lease for a year from conveying parties, since, under any other circumstance, the intended conveyance may operate as a grant. In strictness, therefore, the omission in the lease of those persons who might transfer their estate by grant without livery of seisin, is not so material as to raise an objection to a title; for the release may operate as a grant, though it cannot be effectual as a release; and it may as to some persons operate as a release, and as to others as a grant. And it seems that in *all conveyances by persons who [*162] are merely *cestuis que trust*, the lease for a year is not essentially necessary as part of their assurance; since, at the common law, they could not have conveyed by livery of seisin; and since also any instrument which expresses an intention to transfer the beneficial ownership from one person to another, is effective in a Court of equity. Butl. n. Co. Litt. 290 b. (1) xiv. For " equity regards not the circumstance, but the substance of the act." Francis's Maxims, 53. But, from caution, it is the uniform practice of conveyancers to make the *cestuis que trust*, and all persons who are to join in the release as conveying parties, lessors in the lease. However, it seems clear that, in regard to the conveyance of equitable interests, the lease for a year is used from analogy, rather than principle, or necessity; and that any interest merely equitable, as it may pass without livery of seisin, may pass by a single deed, operating in the nature of a grant, and without enrolment, or other external ceremony. Persons who are merely to release a right or title, or collateral charge, even at law, are never, merely on that account, made parties to the lease, when it is prepared with due attention to form. At the same time, it is safer to make such persons parties, especially in doubtful cases. And in taking a release from an heir-at-law, in confirmation of the title of a devisee, or to supersede the necessity of proving the will; and also when former owners

become parties to release some charge or incumbrance, or to afford evidence of earlier transactions, it is, in all cases, advisable to have the conveyance by lease and release, rather than a simple release of right, or a confirmation.

The bargainee should be the releasee.

The bargainee in the lease for a year, should be the person who is to be the releasee in the release. And when there are to be several releasees, these several persons should be bargainees.

A valuable consideration is essential to a bargain and sale.

To every bargain and sale, it is essential that there should be a valuable consideration; *Mildmay's* case, 1 Co. 176 a; 2 Inst. 671-2; it may be either money, or money's worth, *Wiseman's* case, 2 Co. 15 a; Shep. Touch. 511; Sug. Gilb. Uses, liv. 95, (5): but it is not by any means necessary, as it has been sometimes stated, that there should be a *pecuniary* consideration. Gilb. Uses, 47, 285; 2 Bla. Com. 339; 4 Cru. Dig. 123, s. 5, 127, s. 22, 128, s. 25, 145, s. 15, 2d ed.; 2 Sand. Uses, 45, 3d ed. A horse, a rent reserved, &c., are valuable considerations, and will raise the use on a bargain and sale. Hence it has been held, that the reservation of a pepper-corn rent in the bargain and sale will, in the absence of a pecuniary consideration, be sufficient to answer this requisite. *Barker* v. *Keate*, 2 Mod. 253; 1 Freem. 249. But the consi-

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deration of a long acquaintance, or of friendship, 2 Roll. *Abr. 783; or of natural love and affection; *Osborn* v. *Churchman*, Cro. Jac. 127; or of marriage; *Crossing* v. *Scudamore*, 1 Vent. 137; or that the bargainee is bound in a recognizance for the bargainor, *Ward* v. *Lambert*, Cro. Eliz. 394, cannot create a use upon a bargain and sale.

The lease should include all the parcels intended to be comprised in the release.

The lease should include all the parcels intended to be comprised in the release; for if any of the parcels are omitted to be granted, there will not, as to the omitted parcels, be any estate to be enlarged by the release. It follows, that when there is any omission of parcels in the lease, the assurance caanot, as to the omitted parcels, operate as a lease and release; and therefore, as to the omitted parcels, it will be void, unless the intended release can operate in some other mode: and in this place it is to be remembered, that every release is and may operate as a grant; but every grant is not necessarily a release, or operative as such. *Vide ante*, Vol. 1, p. 452, n. (c). When parcels are to be conveyed in the release by a full description, or even by general words, the same description, or one to the same effect, should be introduced into the lease: and when the parcels are, in the release, to be granted by words of reference to a schedule, except such schedule is merely for identity, a similar schedule, as an accumulative description, should be added to the lease, or the parcels in the schedule should, in that case, be transcribed as the parcels in the lease. When the parcels are granted in the release by words of reference to a more full description contained in a recital, the parcels in the lease should be taken from the deed so recited, or so many of them should be taken as are to be conveyed by the release. Mr. Preston says, when the parcels

are long, or the description of them is rendered complicated by words of reference, it will frequently be found convenient, and, in point of expense, highly prudent, to have the lease indorsed on the release, and to describe the parcels by means of a reference to the release. The description, he says, may be in these words, or to this effect:—"All those manors, &c. "which are mentioned or described in the within-written indenture or "instrument; being the hereditaments expressed and intended to be "thereby released, or otherwise assured unto the said [*bargainee*], as in "the same indenture or instrument is particularly mentioned; and every "part, &c., with their and every of their rights, royalties, members, and "appurtenances." But it seems, that this suggestion cannot be safely followed, on account of the doubt whether parcels can be conveyed by means of a reference to a deed not executed, and consequently not having, at the time of reference, any operative force. When the parcels are long, and the description is not necessarily *by recitals, or when the parcels are described by means of a long schedule, expense may be saved by setting them forth in the lease for a year, and in the release referring to the description in the lease. This mode of reference seems to be free from every objection. To the parcels of the lease, the general words should, in all cases, be added: and if there be any sweeping clause, namely, general words of "all messuages," &c., these, or the substance of them, should be included in the lease. The clause of the "reversion" is generally added: it is a formal, not a necessary part of this instrument. The clause of "*All* the estate," should uniformly be omitted. This clause is proper in those instruments only which pass all the estate of the grantor; and is informal in instruments creating a particular estate. *Vide ante*, Vol. 2, p. 314—318.

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Habendum.

In modern practice, the *habendum* is generally made for one year. Hence this part of the assurance is usually denominated the lease, or bargain and sale for a year. It is, however, immaterial whether the grant be for a year, or for any longer or shorter period. The only caution to be regarded, is to limit the term, so that the same may be an actual, vested, and continuing estate, capable of enlargement at the execution of the release, and not merely a future interest, or an *interesse termini*. With a view to this caution, the lease is generally made to hold "from the day next before the day of the date," and it will be proper to adhere to this form. But even though the *habendum* were to hold henceforth, from the date, or from the making, the lease would immediately, on the execution thereof, give an estate capable of enlargement; and this is the object to be attained.

Reddendum.

The reservation of rent is a formal, and not an essential part of a lease for a year, provided there be a consideration of money, or of money's worth. This clause was introduced into general practice in consequence of the determination in *Barker* v. *Keat*, 2 Mod. 249, that a lease made with a

reservation of a rent, was, in respect of the rent, a lease for a valuable consideration, and might be used as a bargain and sale. It follows, that when there is an express or valuable consideration in the *testatum* part of the deed, the omission of the *reddendum*, or clause reserving the rent, affords no objection against the validity of the assurance as a bargain and sale. It is the usual practice to reserve the rent *generally* during the term, because the law will appropriate the rent to the person to whom it ought to have been reserved. *Whitlock's* case, 8 Co. 71 a, Co. Litt. 47 a. The rent generally reserved is a pepper-corn; but it may be money, a grain of wheat, or the like.

Declaratory clause.

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*The declaratory clause, expressing the intention with which the lease is made, is also a formal, and not an essential part of the assurance. Of course the omission of it would not invalidate the instrument, while a due observance of the usual practice will suggest the propriety of its insertion. 2 Pres. Conv. 361—389.

Recital of a lease for a year sufficient as to lands in Ireland.

As to lands in *Ireland*, the recital of a lease for a year in the deed of release is sufficient evidence of the lease; and therefore no lease for a year is prepared. *Vide ante*, Vol. 1, p. 397, n. (*a*).

A recorded conveyance equal to livery and seisin in Antgua, Saint Vincent, Jamaica, &c.

A recorded conveyance is equal to livery and seisin, in Antigua and the islands thereto adjacent and belonging. *Ante*, Vol. 2, pp. 221, 231. The law is the same in Saint Vincent. Registry act for Saint Vincent, s. 23, 24. Shepherd's Practice of Saint Vincent, 118; and it seems, the law is the same in Jamaica, *Goffe* v. *Elkin*, 2 Mod. 240, and the other West Indian Colonies. [On this point, *vide post*, Vol. 5, p. 543.] See further, *infra*, INDEX TO THE NOTES, title LIVERY OF SEISIN. Where the law is as above-mentioned, a lease for a year is unnecessary; *vide ante*, Vol. 2, p. 222*; however, some persons prepare a lease for a year; but upon what principle it is difficult to conceive.

Colonial conveyance must be registered.

Whether the conveyance be by bargain and sale, grant, or lease and release, to ensure its ultimate validity, it must be registered within the time prescribed by the particular Colonial Registry Act.

Schedule of registered slaves.

See directions as to the schedule of registered slaves to be inserted in a conveyance, mortgage, &c. *ante*, Vol. 2, p. 247.

BARGAIN AND SALE FOR A YEAR, *adapted to a Common Appointment and Release, or a Release alone, to Uses to prevent Dower; or to a Release in Fee at Common Law.*

TO PRECEDE A RELEASE TO PREVENT DOWER, OR A RELEASE AT COMMON LAW.

THIS INDENTURE, made the —— day of ——, in the year of our Lord 18—. BETWEEN [*vendor*], of —— in the county of Sussex, ——, of the first part; [*trustee to prevent dower* (*a*)], of the same place, ——, of the second part; and [*purchaser*], of —— street, in the city of London, ——, of the third part. WITNESSETH, that, in consideration of five shillings, of lawful money current in Great Britain, paid (*b*) to each of them the said [*vendor*] and [*trustee to prevent dower*], by the said [*purchaser*], at or before the sealing and delivery of these presents;

Parties.

Testatum.

(*a*) Whether a purchaser is in all cases entitled to insist upon the concurrence of the trustee to prevent dower, is, perhaps, not a clear point. Some gentlemen invariably make the trustee join with the vendor in the lease and release; while other gentlemen invariably dispense with the concurrence of the trustee. The subject will be considered in a future annotation. *Vide* INDEX TO THE NOTES, title, DOWER.

Whether a purchaser can in all cases insist on the concurrence of the trustee to prevent dower, appears doubtful.

[If a purchaser is entitled to a release at all (as to which *vide post*, Vol. 5, p. 255), it should seem that he may require the concurrence of all the persons who have any estate in possession or remainder, and therefore that of the trustee to prevent dower. It is curious to observe the difference in the practice, which has prevailed in regard to the requisition of his joining in the conveyance, and that of trustees to preserve contingent remainders, whose estate is also a vested remainder for life; and yet no person ever thinks of requiring *their* concurrence.]

(*b*) If there be only one conveying party, say—

ONE CONVEYING PARTY,

"paid to him the said [*vendor*] by the said [*purchaser*], at or before the sealing and delivery of these presents; the receipt whereof is hereby acknowledged; *He* the said [*vendor*] *hath* bargained and sold; *And* by these presents *doth* bargain and sell unto," &c. *ut supra.*

the receipt whereof respectively is hereby respectively acknowledged; *They* the said [*vendor*] and [*trustee to prevent dower*] *have,* and each of them *hath* bargained and sold; *And* by these presents *do,* and each of them *doth* bargain and sell unto the said [*purchaser*], his executors, administrators, and assigns, ALL THOSE, &c.* *(as in the appointment and release):* AND all houses, &c. AND the reversion, &c. *(omitting the clause of* " all the estate," &c.) TO HAVE AND TO HOLD the said messuages, tenements, hereditaments, and premises hereby bargained and sold, or intended so to be, and every part and parcel thereof, with their appurtenances, unto the said [*purchaser*], his executors, administrators, and assigns, from the day next before the day of the date of these presents, for the term or time of one whole year thence next ensuing, and fully to be complete and ended. YIELDING AND PAYING therefore, the rent of one pepper-corn, on the last day of the said term, if the same rent should be lawfully demanded. *To the intent* and purpose that by virtue of these presents, and by force of the statute made for transferring uses into possession, the said [*purchaser*] may be in the actual possession of all and singular the said messuages, tenements, hereditaments, and premises hereby bargained and sold, or intended so to be, and every part and parcel thereof, with their appurtenances; and be thereby enabled to accept and take a grant and release of the reversion and inheritance of the same premises, to him (*c*)

Bargain and sale by vendor and his trustee to prevent dower.

Parcels.

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Habendum for a year.

Reddendum, a pepper-corn.

To the intent that purchaser may be enabled to take a release of the reversion,

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RELEASE AT COMMON LAW.

(*c*) If it be a release at common law, the form may be,

" to him, his heirs, and assigns, for ever. IN WITNESS," &c.

Or,

" to him, his heirs, and assigns, in such manner and form as shall be expressed in and by an indenture intended to bear date on the day next after the day of the date, and executed after the execution of these presents, and to be made between the said [*vendor*] of the one part, and the said [*purchaser*] of the other part. IN WITNESS, &c.

Or

" to him the said [*purchaser*], his heirs and assigns; *To the only proper use and behoof* of him the said [*purchaser*],

and his heirs. *To* (*d*) *such uses*, upon such trusts, and for such ends, intents, and purposes, as shall be limited, expressed, and declared, of and concerning the same, in or by a certain indenture of appointment and release already prepared, and to be executed after the execution of these presents; the said indenture of appointment and release being made or expressed, or intended to be made, between the said [*vendor*] of the first part; the said [*trustee to prevent dower*], of the second part; the said [*purchaser*], of the third part; and [*purchaser's trustee to prevent dower*], of —— Street aforesaid, ——, of the fourth part. IN WITNESS, &c.

TO PRECEDE A RELEASE TO PREVENT DOWER OR A RELEASE AT COMMON LAW.

to uses, to prevent dower.

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his heirs and assigns for ever, by indenture already prepared and intended to bear date the day next after the date of these presents, and to be made between the said [*vendor*] of the one part, and the said [*purchaser*] of the other part. IN WITNESS, &c.

For if on a lease at common law, or a bargain and sale for a year, and a release in enlargement, the use be declared on the seisin of A. the releasee, to the use of A.; or unto and to the use of A., he is in by the common law, and not by the statute: the reason of which is, that, whenever an estate may take effect either by the rules of the common law, or by the statute of uses, the common law is preferred. *Vide ante*, p. 158, 159; Noy's Tenures, 306, 6th ed. [For this reason, where a shifting limitation or a power is introduced into such a conveyance, it is better to convey the lands to A. to the use of B., in order to obviate any doubt that may arise as to whether such limitations can take effect in a deed operating at common law, and not by the statute of uses. *Vide post*, Vol. 5, p. 254.]

On a release to A. to the use of A. he is in by the common law.

(*d*) Or it may be more shortly expressed thus:

" *To the uses*, and for the intents and purposes to be declared by another indenture already prepared, and intended to be dated the day next after the day of the date hereof. IN WITNESS," &c.

Short reference to the uses of release.

TO PRECEDE A RELEASE OF THE POSSESSION OR REVERSION BY SEVERAL, TO USES TO PREVENT DOWER, OR TO TRUSTEES. &c.

BARGAIN AND SALE FOR A YEAR, *to precede a Release of an Estate in* POSSESSION, *or of a* REVERSION *or* REMAINDER *in Fee by several, either to Uses to prevent Dower, or to the Trustees of a Settlement, or to a Mortgagee, or Grantee of an Annuity, with Trusts for Sale, &c.*

THIS INDENTURE, made the —— day of ——, in the —— year of the reign of George the Fourth, &c., and in the year of our Lord 18—. BETWEEN [*trustee*], of Lincoln's Inn Fields, in the parish of St. Giles in the Fields, in the county of Middlesex, barrister at law; [*trustee*], of Saville Row, in the parish of St. James, Westminster, in the said county of Middlesex, surgeon; [*trustee*], of Brentford, in the said county of Middlesex, surgeon; [*other trustee*], of Lincoln's Inn, in the said county of Middlesex, barrister at law; and [*husband*], of —— street, in the said parish of St. James, Westminster, esquire, of the one part; and [*purchaser*], of —— street, Edgeware Road, in the parish of St. Mary-le-bone, in the said county of Middlesex, esquire, of the other part.

Parties.

Testatum. WITNESSETH, that, in consideration of five shillings of lawful money of Great Britain, to each of them the said [*four trustees*] and [*husband*], paid by the said [*purchaser*], at or before the sealing and delivery of these presents (the receipt whereof is hereby respectively acknowledged); *The* said [*four trustees*] and [*husband*] *have*, and each and every of them *hath* bargained and sold; *And* by these presents *do*, and each and every of them *doth* bargain and sell unto the said [*purchaser*], his executors, administrators, and assigns (*a*), ALL THAT piece or parcel

Bargain and sale by five.

Parcels.

BARGAIN AND SALE FOR A YEAR OF A REVERSION OR REMAINDER.

(*b*) If it be a bargain and sale of a reversion or remainder, and it be conveyed as such, the form may be:

"ALL THAT the reversion or remainder in fee simple, ex-

of ground; AND ALL THAT messuage or tenement, erected and built thereon, and now in the occupation of the said [*husband*], situate, standing, and being in —— street, in the said parish of St. James, Westminster, in the said county of Middlesex, and numbered 46 in front, towards the said street, and numbered 214 on the general plan of the estate in Westminster, late belonging to ——, deceased: AND all houses, outhouses, edifices, buildings, stables, sheds, yards, gardens, fences, drains, ways, paths, passages, waters, water-courses, lights, liberties, easements, profits, privileges, commodities, advantages, emoluments, rights, members, and appurtenances whatsoever to the said messuage or tenement, hereditaments, and premises, or any of them, or any part or parcel thereof belonging, or in any wise appertaining; or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof, or of any part thereof: AND the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of the same messuage or tenement, hereditaments, and premises, and every part and parcel thereof. TO HAVE AND TO HOLD the said messuage or tenement,

TO PRECEDE A RELEASE OF THE POSSESSION OR REVERSION BY SEVERAL, TO USES TO PREVENT DOWER, OR TO TRUSTEES, &c.

General words for a house in London.

And the reversion, &c.

Habendum for a year.

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pectant on the determination of the estate for life of [*tenant for life*], of &c., of and in ALL THAT, &c. AND ALSO of and in ALL houses, &c. TO HAVE AND TO HOLD the said reversion or remainder of the said premises expectant as aforesaid, with the rights, &c. YIELDING AND PAYING, &c. *To the intent* and purpose, that, by virtue of these presents, and by force of the statute made for transferring uses into possession, the said reversion or remainder of the said premises, expectant as aforesaid, may be actually vested in the said [*bargainee*]; and that he the said [*bargainee*] may be enabled to accept and take a grant and release of the inheritance thereof, to him and his heirs," &c.

Sed vide ante, Vol. 2, p. 96, n. (*a*).

Although the conveyance be of a reversion or remainder in fee, yet the estate should be limited to uses to prevent dower; for, otherwise, when the reversion or remainder becomes an estate in possession, a right to dower will attach.

A reversion or remainder should be limited to uses to prevent dower.

TO PRECEDE A RELEASE OF THE POSSESSION OR REVERSION BY SEVERAL, TO USES TO PREVENT DOWER, OR TO TRUSTEES, &c.

hereditaments, and all and singular other the premises hereby bargained and sold, or intended so to be, with the rights, members, and appurtenances, unto the said [*purchaser*], his executors, administrators, and assigns, from the day next before the day of the date of these presents, for the term or time of one whole year thence next ensuing, and fully to be complete and ended. YIELDING AND PAYING therefore, the rent of one pepper-corn, on the last day of the said term (if the same should be lawfully demanded); *To the intent* and purpose, that by virtue of these presents, and by force of the statute made for transferring uses into possession, the said [*purchaser*] may be in the actual possession of all and singular the messuage or tenement, hereditaments, and premises, hereby bargained and sold, or intended so to be, with their rights, members, and appurtenances; and be thereby enabled to accept and take a grant and release of the reversion and inheritance of the same premises, to (*b*) him, and his heirs, *To such uses*, and in such manner and form, as shall be expressed in and by an indenture, already prepared, and intended to bear date on the day next after the day of the date, and executed after the execution of these presents; and to be made between the said [*four trustees*], of the first part; the said [*husband*] and —— his wife, of the second part; [*surrenderor of term*], of —— street, Tottenham Court Road, in the said county of Middlesex, carpenter, of the third part; the said [*purchaser*], of the fourth part; and [*trustee to prevent dower*], of —— in the county of ——, ——, of the fifth part. IN WITNESS, &c.

Reddendum, a pepper corn.

To the intent that purchaser may be enabled to take a release of the reversion.

To uses to prevent dower.

TO TRUSTEES OF SETTLEMENT, &c.

(*b*) If the conveyance be to the trustees of a settlement, or to a mortgagee or grantee of an annuity with trusts for sale, &c., say,

" to them the said [*trustees*] and their heirs, *To such uses*, upon such trusts, and for such ends, intents, and purposes, and with, under, and subject to such powers, provisoes, declarations, and agreements, as shall be expressed," &c., *ut supra*.

BARGAIN AND SALE FOR A YEAR, *to precede a Release (a) of an Estate for Lives, or for the Life of the Vendor, either to the Purchaser, or to the Trustees of a Settlement.*

TO PRECEDE RELEASE OF ESTATE FOR LIVES OR LIFE.

THIS INDENTURE, made the —— day of ——, in the —— year of the reign, &c. and in the year of our Lord, 18—; BETWEEN [*vendor*], of &c., [*vendor*], of &c., and [——] his wife, of the one part; and [*purchaser*], of &c., of the other part; WITNESSETH, that, in

Parties.

Testatum.

(*a*) An estate for a life or lives, in lands in *possession*, may be transferred by a recovery, fine, feoffment, lease and release, bargain and sale enrolled, or covenant to stand seised. As to the necessity for livery, or something tantamount to it, on the creation of such an estate, *vide ante*, Vol. 2, p. 308.

On the transfer and surrender of estates for lives.

An estate of freehold in corporeal hereditaments may be created or transferred by *grant*, when the party has merely a reversion or remainder. Incorporeal hereditaments may, in all cases, be transferred, or an estate of freehold in them be created, by *grant*. Pres. Watk. Conv. 32, 36, 3d ed.

An estate of freehold, of lands in possession, may be surrendered to the immediate reversioner, or remainder-man, by deed, or note in *writing*, without livery of seisin, or any thing tantamount to it. Co. Litt. 338 a; Com. Dig. *Surrender* (B); 29 Car. 2, c. 3, s. 3; *Doe* dem. *Wolley* v. *Pickard*, *ante*, Vol. 1, p. 455. But an estate for life of things lying in *grant*, as of a rent, or of an estate in remainder or reversion for life, cannot be surrendered without *deed*. As surrenders by operation of law are expressly reserved by the statute of frauds, they remain as they were at common law. Therefore, if a lessee for life accepts a valid lease in writing from the lessor, though it be only for years, it will be a surrender in law of the lease for life. Wms. n. 1 Saund. 236 *a* and *b*.

But when a married woman has an estate of freehold in lands, either in possession or in reversion, or in an incorporeal hereditament, a fine or a recovery, in which she must be vouched, is requisite to transfer it. Pres. Watk. Conv. 230, 3d ed and the authorities cited, *ante*, Vol. 1, p. 159, 160. A fine is the most usual conveyance for this purpose, excepting

TO PRECEDE RELEASE OF ESTATE FOR LIVES OR LIFE.

consideration of five shillings of lawful money current in Great Britain, paid to (*b*) each of them the said [*vendor*], and [*vendor*], and [——] his wife, by the said [*purchaser*], at or before the sealing and delivery of these presents; the receipt whereof is hereby respectively acknowledged, *They* the said [*vendor*], and [*vendor*] and [——] his wife, *have*, and each and every of them *hath*, bargained and sold; *And* by these presents *do*, and each and every of them *doth* bargain and sell unto the said [*purchaser*], his executors, administrators, and assigns, ALL THAT messuage or tenement, lands, and premises, situate and being at ——, in the county of ——, (with the) [*or* TOGETHER with all out-houses, edifices, buildings, barns, stables, yards, gardens, orchards, lights, easements, ways, waters, water-courses, commons, commodities, privileges, emoluments, advantages, hereditaments, and] appurtenances whatsoever, to the said messuage or tenement, lands, and premises belonging, [or in anywise appertaining, or accepted, reputed, taken, or known as part, parcel, or member thereof. [AND the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits (thereof, [*or* of the said messuage or tenement, lands, and premises hereby bargained and sold, or intended so to be, and every [*174] *part and parcel of the same, with their and every of their appurtenances.] TO HAVE AND TO HOLD the said messuage or tenement, lands, (and premises, [*or* and all and singular other the premises] hereby bargained and sold, or intended

Bargain and sale.

Parcels.

General words.

And the reversion, &c.

Habendum for one year, if nominees should so long live.

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where a recovery is requisite for some other purpose. A fine alone is sufficient, without a lease and release, or any other conveyance. *Vide ante*, Vol. 2, p. 310. As to the conveyance or release of a married woman's rent-charge, or personal annuity for her own or another's life, *vide ante*, Vol. 2, p. 328, n. (*a*). But by stat. 29 Geo. 2, c. 31, a married woman entitled to, or interested in, any lease for lives, or any person on her behalf, may, by the direction of a Court of equity, surrender such lease for the purpose of renewal, by deed only, without levying any fine. [*Vide post*, Vol. 4, p. 484].

ONE VENDOR.

(*b*) If there be only one vendor, say,

"to him the said [*vendor*], by the said [*purchaser*], at, &c. the receipt whereof is hereby acknowledged, HE the said [*vendor*] *hath* bargained and sold," &c.

to be, [and every part and parcel thereof,] with their [and every of their] appurtenances, unto the said [*purchaser*], his executors, administrators, and assigns, from the day next before the day of the date of these presents, for the term or time of one whole year thence next ensuing and fully to be complete and ended, if (*c*) [*nominees*] of &c. (any or) either of them should so long live. YIELDING AND PAYING therefore [unto the said (*d*) [*vendor*], and [*vendor*], and [——] his wife, their heirs or assigns,] the rent of one pepper-corn on the last day of the said term, [if the same rent should be lawfully demanded.] *To the intent* and purpose, that by virtue of these presents, and by force of the statute made for transferring uses into possession, the said [*purchaser*] may be in the actual possession of all and singular the messuage or tenement, lands, and premises hereby bargained and sold, or intended so to be, with the appurtenances; and be thereby enabled to accept and take a grant and release of the reversion and freehold of the same premises, to (*e*) him, his heirs, and * assigns, for and during the natural (*f*) lives of the said [*nominees*], and the (survivors and) survivor of them, [*To the use* of the said [*purchaser*], his heirs and assigns, for and during the natural (*f*) lives of the said [*nominees*], and the (sur-

TO PRECEDE RELEASE OF ESTATE FOR LIVES OR LIFE.

Reddendum.

To the intent that purchaser may be enabled to take a grant and release of the reversion and freehold, for the lives of nominees.

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Reference to release.

(*c*) If for the life of the vendor, say,

FOR VENDOR'S LIFE.

"if the said vendor should so long live."

(*d*) If rent be reserved, it should be to the bargainors of the legal estate; but it is usual to make the reservation generally, without saying to whom. *Vide ante*, p. 164.

(*e*) If the conveyance be to the trustees of a settlement, say,

TO TRUSTEES OF A SETTLEMENT.

"to them the said [*trustees*], and their heirs, for and during the natural lives of the said [*nominees*], and the (survivors and) survivor of them, *To such uses*, upon such trusts, and for such ends, intents, and purposes, and with, under, and subject to such powers, provisoes, declarations, and agreements, as shall be mentioned in or by an indenture of release already prepared and intended," &c. *ut supra*.

(*f*) If for the life of the vendor, say,

FOR VENDOR'S LIFE.

"life of the said [*vendor*],"

TO PRECEDE RELEASE OF ESTATE FOR LIVES OR LIFE.

vivors and) survivor of them], in such manner and form as shall be expressed in and by an indenture of release, already prepared, and intended to bear date on the day next after the day of the date, and to be executed after the execution of these presents, and to be made between the said [*vendor*], and [*vendor*] and [——] his wife, of the one part, and the said [*purchaser*] of the other part. IN WITNESS, &c.

DEMISE AT COMMON LAW BY A CORPORATION.

DEMISE *for a Year at Common Law, by a* CORPORATION, *to be perfected by the Lessee's Entry previous to the Release; with an* ATTESTATION *and* MEMORANDUM OF ENTRY (*a*).

THIS INDENTURE, made the (*b*)—— day of ——, in the —— year &c. George the Fourth, &c. and in the year of our *Lord, 18—, BETWEEN the mayor (*c*) and common-

Parties.

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(*a*) See the reasons why this mode of conveyance is adopted, *ante*, p. 159; and see the next note, *ad ultimum*.

The date of a lease for a year from a corporation.

(*b*) The lease for a year from a corporation generally bears date several days before the release. When the lands are at a distance from the corporation, this must necessarily be the case. But where the locality of the premises will admit of it, there appears to be no objection to date the lease the day preceding its execution, and for the lessee afterwards to enter, and then to return to the common council of the corporation, and for them to execute the release, at the same common council as they executed the lease. Indeed there is no objection to the lease being dated on the same day as the release, provided the lease be executed first, and the lessee enter before the execution of the release.

To avoid trouble and doubts on this point, a corporation should convey by feoffment. See the form, *infra*, Vol. 4, p. 132, and also FEOFFMENT, title PURCHASE.

BAILIFFS, &c.

(*c*) If it be the case, say,

" the mayor, bailiffs, burgesses, and commonalty," *or* " the mayor, aldermen, and burgesses of," &c. *ut supra, and repeat these words all through, ut ante*, Vol. 1, p. 267.

DEMISE AT COMMON LAW BY A CORPORATION.

alty of the town, (borough, (city, (*or* town and county,) of ——, of the one part; and [*purchaser*], of &c., of the other part; WITNESSETH, that, for and in consideration of the sum of five shillings of lawful money of Great Britain to them the said mayor and commonalty paid by the said [*purchaser*], at or before the sealing or delivery of these presents; the receipt whereof is hereby acknowledged; *They* the said mayor and commonalty *have* granted and demised: *And* by these presents *do* grant and demise unto the said [*purchaser*], his executors, administrators, and assigns, ALL THAT messuage or tenement, &c. (*with general words and clause of the reversion, ut ante*, p. 170, *or* 173.) TO HAVE AND TO HOLD the said messuage or tenement and premises hereby granted or demised, or intended so to be, with their appurtenances, unto the said [*purchaser*], his executors, administrators, and assigns, from the day next before the day of the date of these presents, for the term of one whole year from thence next ensuing, and fully to be complete and ended. YIELDING AND PAYING therefore to the said mayor and commonalty, or their successors, the rent or sum of one shilling of lawful money of Great Britain. *To the intent* and purpose that the said [*purchaser*] may enter into and upon, and take possession of the said messuage or tenement, and premises hereby demised, and be thereby enabled to take and accept a grant and release of the reversion and inheritance thereof to be *made to him and his heirs (*d*) by the said mayor and commonalty, by an indenture already prepared, and intended to bear date the —— day of this instant month of ——, and to be made between the said mayor and commonalty of the first part, and the said [*purchaser*], of the second part. IN WITNESS whereof the said mayor and commonalty have hereunto set their common seal, the day and year first above written.

Testatum.

Grant and demise.

Parcels.

Habendum.

Reddendum.

To the intent that lessee may enter, and be thereby enabled to take a release of the reversion and inheritance.

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Testimonium.

(*d*) The release may be to uses, to prevent dower, &c., as the uses will arise out of the seisin of the releasee. *Vide ante*, p. 160. If the release be to uses, see the forms, *ante*, p. 167, 171.

RELEASE TO USES.

DEMISE AT COMMON LAW BY A CORPORATION.

Attestation.

THE common seal (*e*) of the within-named mayor and commonalty was, at a common council, held on the day of the date of the within-written indenture, affixed thereto, by the said mayor, in the presence of us, [L. S.]

MEMORANDUM OF ENTRY.

MEMORANDUM OF ENTRY *to be indorsed on the Lease for a Year.*

BE IT REMEMBERED, that on this —— day of ——, in the year of our Lord 18—, the within-named [*purchaser*] did, under and by virtue of the within-written

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Grant by corporation by deed, without delivery, is good.

(*e*) Grants by corporations must be by deed under their common seal; Com. Dig. *Franchise*, (F. 13); and such deed, so sealed, is good without delivery. *Willis* v. *Jermine*, 2 Leon. 97; Cro. Eliz. 167, *S. C.*; Davys's Rep. 44 b; Watk. Conv. *Corporation;* Harg. n. Co. Litt. 36 a, (5); 6 Vin. Abr. 267, (G. 2); Ibid. 292, (K. 2); 1 Kyd on Corporations, 263, 268.

The head cannot grant without some of the body;

nor the body without the head.

A dean without the chapter, a mayor without his commonalty, the master of a college or hospital without his fellows, cannot purchase or grant, or make any contract that will bind the corporation. 2 Bac. Abr. 10, Gwill. ed. *Corporations* (E), 1. So, *e converso*, a bond or contract entered into by the body, in the absence or imprisonment of the head, will not bind. 21 Edw. 4, 12.; *Anon.* 12 Mod. 232; *Rex* v. *Carter*, Cowp. 222, 226. Where no provision is made by the constitution of a corporation, the whole are bound by the acts, not only of the major part, but of the major part of those who are present at a regular corporate meeting, whether the number present be a majority of the whole body or not. *The Queen* v. *Sutton*, 10 Mod. 76; *Attorney-General* v. *Davy*, 2 Atk. 212; *Rex* v. *Varlo*, Cowp. 250; Com. Dig. *Franchise*, (F, 11). So, though a particular constitution requires the *presence* of a majority of the *whole* number, yet the *concurrence* and *consent* of a majority of the whole is not necessary: it is sufficient that a majority of the number *present* concur. *Cotton* v. *Davies*, 1 Str. 53; *Oldknow* v. *Wainwright*, 2 Burr. 1019. So, where a number less than the majority of the whole, are, by a particular constitution, competent to do a corporate act, the act of a majority of that smaller number is equivalent to the act of a majority of the whole. 2 Gwill. Bac. Abr. 16.

The acts of a majority present at a meeting, duly summoned, generally bind the whole.

The seal of a corporation should be prov-

The seal of a corporate body ought to be proved by a witness acquainted with the impression. *Moises* v. *Thornton*, 8 Durnf. & East,

indenture, enter into and upon, and take possession of, the messuage or tenement and premises thereby demised to him the said [*purchaser*] (*f*); *And* did thereupon pay to the within-named mayor and commonalty the sum of one penny, in part of the sum of one shilling, reserved by the within-written indenture; *In* the presence of us,

MEMORANDUM OF ENTRY.

[*Purchaser*, or *Releasee*.] [A. B.], of, &c.
[C. D.] of, &c.

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307. It is not, however, necessary to prove the seal of a corporation in the same manner as the seal of an individual, that is, by producing a witness who saw the seal affixed to the identical instrument; but, when an instrument purports to be under the seal of a corporation, it will be sufficient to shew that the seal is the official seal of the corporate body. 8 Durnf. & East, 307. In *Woodnass* v. *Mason*, 1 Esp. N. P. C. 53, it was held by Lord *Kenyon*, that the seal of the city of London proves itself. Phillipps on Evidence, 387, 4th ed. Nor is it necessary that the party producing the deed of a corporation should prove, by a witness, the fact of the seal having been regularly affixed, or that a requisite majority of the corporation agreed; but if it be alleged to have been affixed by the hand of a stranger, that must be proved by the party who alleges it. See Skin. 2; 1 Kyd on Corporations, 268. However, on a grant by a corporate body, it is usual to have an attestation.

ed by a witness acquainted with the impression.

As to attestation generally, *vide ante*, Vol. 2, p. 651, n. (*a*).

(*f*) This payment does not appear to be requisite.

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BARGAIN AND SALE IN FEE, &c.

For BARGAIN AND SALE IN FEE, &c., *see titles* PURCHASE, *and* RECOVERY; *and* INDEX TO THE PRECEDENTS, *title* BARGAIN AND SALE.

BARGAIN AND SALE IN FEE, &c.

BILL OF SALE.

For BILL OF SALE, *see titles* MORTGAGE, *and* PURCHASE; *and* INDEX TO THE PRECEDENTS, *title* BILL OF SALE.

BILL OF SALE.

BOND.

PAYMENT OF MONEY AND INTEREST.

BOND *for Payment of* MONEY *and* INTEREST, *either in one Sum or by Instalments, and either with one, two, three, or more Obligors, or one, two, three, or more Obligees.*

Common obligation from one to one.

KNOW ALL MEN BY THESE PRESENTS, *That* I (*a*), [*obligor*], of ——, in the county of ——, [*yeoman*], am held and firmly bound to (*b*) [*obligee*], of ——, in the county of ——, [*esquire*], in the sum of [*double the amount of the principal sum to be secured, vide post*, p. 199, n. (*a*)] pounds of lawful mo-

[*180] * ney of Great Britain; to be paid to the said (*c*) [*obli-*

TWO OR MORE OBLIGORS.

(*a*) If there be two or more obligors, say,

" WE [*obligor*], of &c., [*other obligor*], of &c., (*or* [*surety*], of &c.), are held," &c., *ut supra.*

TWO OR MORE OBLIGEES.

(*b*) If there be two or more obligees, say,

" [*obligee*], of &c., and [*obligee*], of &c."

TWO OR MORE OBLIGEES.

(*c*) " [*obligee*], and [*obligee*], or to their certain attorney, executors, administrators, or assigns; *For*," &c., *ut supra.*

Some gentlemen say,

" [*obligees*], or to one of them, or to their or his certain attorney, executors," &c., *ut supra.*

One of divers obligees may release the obligor.

But the first form seems to be the most correct, upon principle. For, although there are divers obligees, yet if one releases to the obligor, it bars all. 2 Roll. Abr. 410, (D), pl. 1. So, if there are two conusees of a statute, and one of them releases to the conusor, the release extinguishes all the statute against the other also. *Ibid.* 411, pl. 5. So, if two executors sell the goods of the testator for a certain sum of money, and take an obligation for the money, the release of one of them shall bar both. *Ibid.* pl. 6; 18 Vin. Abr. 348; 5 Bac. Abr. 702, Gwill. ed. *Release*, (G). Therefore, there is not any necessity for saying that the payment may be

gee], or to his certain attorney, executors, adminis- PAYMENT OF MONEY AND INTEREST.
*trators, or assigns: *For* which payment to be well
and truly made, I (*d*) bind myself, my heirs, exe- [*181]

made " to one of them." If, by the words, " to one of them, or his certain attorney," &c., it is meant that the payment may be made to the survivor, or his executors, &c., the expression is useless, because the remedy necessarily survives. It cannot be supposed, that by those words, and the words in the condition, noticed *post*, p. 196, the intention is, that payment may be made to the executors of a deceased obligee in the life-time of the other joint obligees.

But, nevertheless, if an obligation be made to three, and two bring their action, they ought to shew that the third is dead. Sid. 238, 240; 5 Bac. Abr. 163, Gwill. ed. *Obligations*, (D), 3. So, if an obligation be made to three to pay money to one of them, they must all join in the suit, for they are but as one obligee; and if he to whom the money is to be paid, dies, the others must sue, although they have no interest in the sum contained in the condition. *Rolls* v. *Yate*, Yelv. 177. But it seems otherwise where the obligation is several. For, it is said, if A. be bound to B. and C., paying one moiety to B., and the other to C., this is a several obligation, and the release of one shall not prejudice the other; nor can one of them bar the other of his action; *per* Justice *Brown*, Moore, 641. For the whole Court held, that, if the words " equally to be divided," be in the obligation, it is not a joint debt, but divided debts; *Shaw* v. *Sherwood*, Cro. Eliz. 729; and *Glanvill* said, that there may be several obligations to several men of several sums, in one deed. Dyer, 350, a, (20) *in marg.* The case of *Shaw* v. *Sherwood*, was afterwards affirmed on a writ of error. *Whorewood* v. *Shaw*, Yelv. 25. However, where a bond of 200*l.* was made to two, to pay them, *scilicet*, one hundred pounds to one of them, and the other hundred to the other: one of the obligees died, and his executor sued for the one hundred pounds; and in the 18 Eliz. it was made a *quære*, whether the entire 200*l.* should not accrue to the survivor? But in the 21 & 22 Eliz. it was resolved by the Court that the 200*l.* survived, and that the words " *scilicet*, one hundred pounds to one, the other hundred to the other," were void words. Dyer, 350 a, (20), *& in marg. ad ult.* Lord *Hobart* also thought that the *scilicet* severing the money between them, made that *solvendum* void. See *Stukely* v. *Butler*, Hob. 172. Hargr. n. Co. Litt. 180 b, (1). The principle of the above cited case of *Shaw* v. *Sherwood*, seems to be the better opinion, because it accomplishes the expressed intention of the parties. [It seems that where several persons bind themselves in a given sum *each*, this is a several bond. *Collins* v. *Prosser*, 1 Barn. & Cress. 682.]

If a bond be made to three, two cannot bring an action, unless the third is dead.

But it seems, if the obligation be several, one obligee cannot prejudice the other; but each may maintain an action for the several debt.

(*d*) If there be two obligors only, say,

" We bind ourselves, and each of us, our and each of our TWO OBLIGORS

PAYMENT OF MONEY AND INTEREST.

cutors, and administrators, and every of them, firm-

heirs †, executors, and administrators, and every of them jointly and severally, firmly," &c. *ut supra.*

THREE OBLIGORS.

If there be three obligors only, say,

" We bind ourselves, and each of us, and any two of us, our and each of our and any two of our heirs, executors, and administrators, jointly, severally, and respectively, firmly, &c., *ut supra.*

THREE OR MORE OBLIGORS.

If there be more than three obligors, say, varying it as the circumstances of the case require,

" We bind ourselves, and each of us, and any four, three, or two of us, our and each of our, and any four, three, or two of our heirs, executors, and administrators, jointly, severally, and respectively, firmly," &c., *ut supra.*

Or the full form, *ut ante*, Vol. 2, p. 608, may be used: but both forms have the same effect.

On a joint and several bond [or covenant], the obligee may sue all jointly or any *one* separately:

If two or more bind themselves in an obligation jointly and severally, the obligee may sue them all jointly, or he may sue any one of them, at his election; but if they are jointly, and not severally bound, the obligee must sue them jointly. However, if three or more bind themselves jointly and severally, the obligee cannot sue two of them only, jointly; unless it appear to the Court that the other obligors are dead. But if two be bound in a bond jointly, and one be sued alone, though he may plead this matter in abatement of the writ, yet he cannot plead *non est factum;* for it is his deed, though it be not his sole deed. Co. Litt. 283 a. *Vide ante*, Vol. 1, p. 502. And as to a joint covenant, *vide ante*, Vol. 1, p. 312. It is for the purpose of enabling the obligee, or covenantee, to sue two or more of the obligors or covenantors alone, without joining the others, that the usual severance in an obligation, and in the lien part of a covenant, is made, *ut ante*, Vol. 1, p. 502, Vol. 2, p. 608, as to a bond: *ante*, Vol. 1, 634, as to a covenant.

On a joint bond; the representa-

If the bond be joint, and one of the obligors dies, his representatives

Heirs are not bound, unless named [in a writing, under hand and seal]; but executors and administrators are [bound by any writing, although not named].

† The heirs must be expressly named in a writing under hand and seal, otherwise they are not chargeable. *Barber* v. *Vox*, 2 Saund 136. *Gifford* v. *Manley*, Cas. temp. Talb. 109; 3 Bac. Abr. 458, Gwil. ed. *Heir*, &c. (F). But the executors and administrators are bound by every bond or covenant, without being named. Dyer, 14, pl. 69. Wms. n. 2 Saund. 137 a. For any word which will prove a man a debtor, or to have money, if it be by writing, will charge his executor or administrator. Noy's Max. 105.

ly by these presents; *Sealed* with my seal: DATED

PAYMENT OF MONEY AND INTEREST.

are totally discharged at law, and the survivor or survivors only are chargeable. But it is otherwise if the obligors were bound jointly and severally. *Towers* v. *Moore*, 2 Vern. 99. 5 Bac. Abr. 164, Gwill. ed. *Obligations*, (D), 4. [And the same rule applies to covenants. As to whether covenants are to be construed as joint or several, *vide post*, Vol 4, p. 370.]

tives of a deceased obligor are discharged at law; but it is otherwise if it be joint and several.

In equity it was formerly held, that the representatives of a deceased joint obligor were liable: for in *Primrose* v. *Bromley*, 1 Atk. 90, Lord *Hardwicke* said, "there was a case which I determined in this Court, where there were two persons *jointly* bound in a bond; one of the obligors died; and to be sure, at law, it might have been put in suit against the survivor; but as I thought it extremely hard, I decreed the representatives of the co-obligor should be charged, *pari passu* with the surviving obligor, in the payment of the bond." And see *Church* v. *Bishop*, 2 Ves. 373. But the present doctrine in equity appears to be otherwise; qualified, however, by the exception of *joint bonds by co-partners for partnership debts*, which have been held to be *several*.

In equity formerly the representatives of a deceased joint obligor were liable; but present doctrine otherwise in all cases excepting *joint bonds for partnership debts:*

which have been held to be *several.*

Some of the cases in relation to joint bonds by co-partners, were decided on the ground that the bonds were filled up by the parties themselves; that they were ignorant of the distinction between a joint bond, and a joint and several bond; and that it was the intention of the parties, that the obligors should be severally, as well as jointly bound: therefore, the obligees were admitted creditors on the separate estates of the obligors. *Ex parte Symonds*, 1 Cox, 200. In the bankruptcy of *Bates* and *Henckell*, cited 3 Ves. 400; and in the bankruptcy of *Freeman* and *Grace*, Ibid. 401; *Daniel* v. *Cross*, Ibid. 279; and in *Thomas* v. *Fraser*, 3 Ves. 399, it was admitted to have been the intention, that the bond should be in the common and usual form of bonds from two persons; the same, in effect, as the admission in the other cases. But the Court particularly noticed the additional circumstance, that there had been a previous promissory note for part of the debt; and observed that the bond was no better security than a note, unless it was a joint and several bond. For a partnership note from persons in trade would have all the effect that a joint bond would have. And therefore, in that case, one of the obligors being bankrupt, the personal and real assets of the other of them, who was dead, were held liable to the payment of the principal and interest. *Gray* v. *Chiswell*, 9 Ves. 125. So, in *Burn* v. *Burn*, 3 Ves. 574, the evidence was very full as to the intention, that each partner should be severally bound; and that the bond was filled up as a joint bond through mistake, and the ignorance of the parties: it was therefore held that the bond should be several, against creditors, in the administration of assets. In this case the obligors were described as "Mayne & Co.," without naming the different partners; and the bond was executed by Mayne only, because his name stood first in the firm; but as he exe-

1st, where the bonds were made joint only by mistake;

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this —— day of ——, [in the —— year of the reign

cuted the bond with the privity of the other partners, who were present at the execution, it was held that they were all bound by it. 3 Ves. 573, 575, 578. *Ball* v. *Dunsterville*, 4 Durnf. & East, 313. Thus it appears that the cases of relief on joint bonds may be accounted for on the ground of mistake in the manner of framing the instrument; and it may be said that equity gives to them no other effect than it was the intention of the parties themselves to have given to them. *Underhill* v. *Horwood*, 10 Ves. 227, 228.

2nd, In equity, partners and their representatives have been held severally liable, though the bond or note for partnership debt was joint.

However, it may be proper to observe further, that the common law, though it professes to adopt the *Lex Mercatoria*, nevertheless, it has not adopted it throughout, in what relates to partnership in trade. It holds, indeed, that, although partners are in the nature of joint tenants, there shall be no survivorship between them in point of interest; yet, with regard to partnership contracts, it applies its own peculiar rule; and because they are in form joint, holds them to produce only a joint obligation, which consequently attaches exclusively upon the survivors; whereas, it is apprehended, by the general mercantile law, a partnership contract is several as well as joint. That may probably be the reason why Courts of equity have considered joint contracts of this sort (that is, joint in form) as standing on a different footing from others. *Devaynes* v. *Noble*, 1 Meriv. 564. Thus, in the case of *Lane* v. *Williams*, 2 Vern. 277, 292, the ground of the decree was, not that the partnership had given a note, but that the note was given for a partnership debt. It was, not that the note was, either in its form, or in the intention of the parties, to be considered as the separate note of each; and, least of all, as the separate note of Williams, who knew nothing of the occasion of giving it: but the declaration in the decree (as taken by Mr. Raithby from the Register's book) was, " that Richard Newberry and the defendant, Williams's intestate, being partners at the time of borrowing the money and giving the note in question, and the said money being lent on the credit of such partnership, that either of the said partners was liable to pay the same." Then it adds, " and the rather, for that the defendant Williams took such bond from Newberry as aforesaid." That circumstance is stated as corroborating the equity in the particular case, but not as the ground of it, because it is explicitly declared, that *quà* partners, they were, each of them, liable for the partnership debt. In *Bishop* v. *Church*, 3 Atk. 691, 2 Ves. 100, 371, though Lord *Hardwicke* doubted a little, at first, whether it sufficiently appeared that the bond was intended to be separate as well as joint; yet, when it was ascertained that the money had been borrowed in the course of the partnership dealing, he thought the equity was perfectly clear. So in *Jacomb* v. *Harwood*, 2 Ves. 267, it is evident that Sir *John Strange* was of opinion, that the estates of both partners were liable to the payment of the note, though it was not

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necessary to resort to that equity in the particular case, inasmuch as the surviving partner, being the executor of the deceased partner, had executed a mortgage to secure the debt, which it was held to be within his competency to do. In *Daniel* v. *Cross*, 3 Ves. 277, no doubt whatever appears to have been suggested with regard to this equity. The only question was, whether it had been waived by the subsequent dealings with the new house. It is true, in *Ex parte Kendall*, 17 Ves. 525, in the bankruptcy of the firm of *Devaynes & Co.*, bankers, Lord *Eldon* expresses his surprise, "that a Court of equity should have interposed to enlarge the effect of a legal contract;" but Sir William *Grant* said, "I do not understand him to have intimated a doubt of the existence of this equity." Indeed, his Lordship said, in relation to this equitable liability of partners, "the modern doctrine certainly is, that, where a man has chosen to take the joint credit of several, though at law his security is wearing out, as each of his debtors dies; yet it is fit that the creditor, whose debt remains at law only against the survivors, should resort to the assets of a deceased debtor; and a Court of equity will, under certain modifications, constitute that demand:" 17 Ves. 525: "but it is too much to say, that because there is a doctrine in this Court, that the creditors of the five might, under certain circumstances, go in, every such creditor has a right to resort to the separate estate of *Devaynes*, or that the subsequent dealings of a particular creditor may not have not made it inequitable that he should do so." 1 Rose, 75, *S. C.* And his Lordship himself acted on this equity, in *Gray* v. *Chiswell*, 9 Ves. 118; for, if the remedy had been extinct in equity, as it was at law, the joint creditors would have had no more right to come on the surplus of the effects, than to share them with the separate creditors; yet, on the surplus they were admitted, and without regard to the manner in which their debts were constituted. And see *Underhill* v. *Harwood*, 10 Ves. 227. In the case of *Ex parte Kendall*, the Lord Chancellor took it to be clear, that the only question which Mr. Devaynes's representatives could make was, whether these creditors had so dealt with the surviving partners, as to make it inequitable in them to resort to his assets. "Then" added the late venerable Master of the Rolls, Sir William *Grant*, in *Sleech's* case, in *Devaynes* v. *Noble*, 1 Meriv. 566, "what is that sort of dealing by which this effect is to be produced? I apprehend it must be something very different from what has taken place in Miss Sleech's instance.

Equity of a creditor against the estate of a deceased partner, not barred by eight months' non claim, and

"It is contended by the representatives of Mr. Devaynes, that Miss Sleech has lost her remedy against his estate, merely by not having prosecuted her demand in the interval between his death and the bankruptcy of the surviving partners; which is a period of about eight months. All that has passed in her case is, that she has received a payment of a part

grace of God of the United Kingdom of Great Bri-

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payment in part by the surviving partners.

of her debt, and that she has taken no step for the recovery of the remainder of it. Now, if the equity stands upon any principle, upon what assignable principle can it be barred by this short arbitrary limitation? Upon what authority can a creditor be told, that the estate of Mr. Devaynes was, at the moment after his death, liable to his demand; but that he has no longer any claim upon that estate, even although in the mean time there should have been no dealing whatever between him and the surviving partners. In the case of *Lane* v. *Williams*, 2 Vern. 277, 292, there was certainly a much greater *laches*, if *laches* it is to be called; and the hardship that is insisted upon in this case was strongly complained of there; of letting in the demand of a creditor upon the separate estate of the deceased partner, after such a length of time: for the defendant, besides insisting that it did not appear that Williams was privy or consenting to the borrowing of this money, or that it was brought into stock, or used in the trade, further insisted, that, had the plaintiff demanded it in the life-time of Newberry, who was the surviving partner, or before his estate was wasted, and his assets exhausted, she, the defendant, might have had recourse to the bond of copartnership, to repair the loss sustained by Newberry's taking up the money, and giving such note without the consent or privity of her husband: but she (his representative) had lost her remedy by the plaintiff's *laches* in not demanding the debt sooner, and therefore the plaintiff ought not to have the assistance of a Court of equity to charge her. This, however, was urged in vain. The Court said, very nearly in the terms I have already stated from the decree, that 'the money being paid at the shop, the note of one partner binds both; and, though at law the note stands good only against the executor of the surviving partner (who was Newberry), who received the money, and signed the note, yet it was proper in equity to follow the estate of Williams for satisfaction.' In the case of *Daniel* v. *Cross*, 3 Ves. jun. 277, the partnership had been dissolved in the month of March, 1791. The testator died in June, 1791. Advertisements had been published for all the creditors to come in and claim their debts upon his estate. The bankruptcy of the new house did not happen till the month of March, 1793; and yet it was hardly contended, that the lapse of time, from June, 1791, to March 1793, was sufficient to exclude the claim upon the estate of the predeceased partner. The argument turned entirely upon the effect of the subsequent dealings. I take it, that it must, therefore, upon the authority of these cases, and upon general principles, be held, that, in the case of an ordinary partnership, it is impossible to say that Miss Sleech has been guilty of such *laches* as to preclude her from such remedy as she originally had against Mr. Devaynes's estate.

No difference in

"But it is supposed that there is a considerable difference between the

tain and Ireland King, Defender of the Faith; and]

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case of bankers and that of any other partnership: and that it is impossible for the creditors of a banking shop to permit their money to remain in the hands of the surviving partners for such a space of time as eight months (indeed, the argument went to eight days, or even to a shorter period), without recognizing those surviving partners to be the depositaries of the balance due, and therefore exclusively responsible to make what is called the deposit forthcoming. There is a fallacy in likening the dealings of a banker to the case of a deposit, to which, in legal effect, they have no sort of resemblance. Money paid into a banker's becomes immediately a part of his general assets; and he is merely a debtor for the amount. Therefore, when a man lodges money with a partnership of bankers, he is as much concerned to look to the solvency of each particular partner, as if he was lending money to any other partnership. The money, in each case, equally ceases to be his, the moment he has parted with it, and he has only to trust, for the return of it, to the solvency of the persons into whose hands it passes; but he has, in each case alike, the credit and the responsibility of all the partners in the firm. Then, when one partner dies, what is to be inferred from the mere circumstance of allowing the debt upon the banking account to remain uncalled for in the hands of the surviving partners, beyond what would be inferred from not immediately calling in any debt due by the surviving partners in any other trade, where money had been advanced or lent to that partnership? The security is permitted to stand just as it did, the party doing nothing to alter it. There is no *novatio debiti*—no new contract—no relinquishment of the old security, whatever it may, either in law or equity, be defined to be.

principle between the case of a banking-house and any other partnership, as to the equity of the creditor against the deceased partner's estate.

Money paid into a banker's constitutes a debt, not a deposit.

Creditor's leaving money in the hands of the surviving partners in a bank, does not constitute a new contract, nor operate as a relinquishment of the old security.

"Then, it is supposed that there is a rule of convenience which requires that the creditors of a banking-house shall make their demand for their balances upon the surviving partners within some very short period of time, or else be held to have waived their recourse against the estate of the deceased partner. Now I doubt whether the estate of a deceased partner would, upon the whole, be much benefited by the establishment of such a rule. For, if creditors were told that the only way in which they could preserve their recourse against the estate of a deceased partner, is by using all possible diligence to compel an immediate payment by the surviving partners of the whole of their balances; there are very few houses which could stand such a sudden and concurrent demand as that would necessarily bring upon them. A house might be reduced to a state of bankruptcy, which, in the ordinary course of business, would have been able to fulfil all its engagements; and a demand would be brought on the estate of a deceased partner, from which it might otherwise have wholly escaped; and, therefore, if expediency were to be taken into the con-

No rule of convenience, fixing any period within which a creditor of a banking-house not making his demand on the surviving partners is held to have waived his equity against the estate of the deceased partner.

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in the year of our Lord, one thousand eight hundred and ——.

sideration, I do not see what purpose of general convenience would be answered by compelling creditors to such a rigorous course, as the condition upon which alone the hold which equity gives them on the estate of a deceased partner could be retained.

Notice of the death of the deceased partner, whether before or after the creditor has received payment in part from the surviving partners, not material.

"Then comes the question, whether, if Miss Sleech has not by her *non-feazance* lost her remedy against this estate, she has lost it by any thing she has actually done. The first consideration is, whether the circumstance of her having called for and received a part of her balance makes any difference. Whether it was called for before or after she knew of Mr. Devaynes's death is not, in my view of the case, at all material to the question. *Ex hypothese*, the surviving partners are liable to the payment of this debt, and ought, in the first instance, to be called upon for the payment of it. How is it, then, that a creditor, by acting upon that ackowledged liability, to the extent that his convenience and occasions may happen to require, is, *quoad* the residue of his debt, to be placed in a worse situation than he would have been *quoad* the whole, if he had demanded no part of it? Miss Sleech, by drawing a draft upon the surviving partners, recognizes them as her debtors. Such undoubtedly they were; but how does that affirmative act prove negatively, that thenceforth no other persons were to be her debtors?

Creditor, by drawing on the surviving partners, recognizes them as his debtors, but not exclusively.

Creditor signing certificate of surviving partners, does not thereby release the estate of a deceased partner.

The statute gives the release, in consequence of the certified conformity of the bankrupt.

"Another act, which is imputed to Miss Sleech as one which releases the testator's estate, is, that she has signed the bankrupt's certificate. Now, I apprehend that that can amount to no release of the demand upon Mr. Devaynes's estate. Supposing the 10th of Anne, c. 15, s. 3, had never passed, I do not conceive that the signing of a bankrupt's certificate could have operated as an ordinary release with regard to any third person; for it is the Act of Parliament that gives that release, in consequence of the certified conformity of the bankrupt to the re-

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*quisitions of the bankrupt laws. A man, by signing a certificate, does not release his own debt, unless the requisite number of creditors afterwards sign; and, if they do sign, the debts of those who do not sign, are as much released as the debts of those who do sign. If it were necessary to resort to the act, it appears to comprehend this case, as it extends to every case of joint contract, or joint obligation of any sort. Therefore, it appears to me, that Miss Sleech has not, in any way, released the demand which it is assumed by the decree, and clearly established by the authorities, that she had at the time of the death of Mr. Devaynes. I am consequently of opinion, that the report of the Master is right, and that the exception must be over-ruled."

Joint covenant of indemnity by partners, not

But in *Sumner* v. *Powell*, 2 Meriv. 30, where bankers, carrying on business in partnership, received a power of attorney from the trustees in a

marriage settlement to receive dividends on stock, including an authority to transfer; and under this authority, one of the partners (Powell the elder) alone, in 1792, sold the stock, and applied the produce to the purposes of the partnership, without the knowledge either of the trustees or of his partners. In 1797, Sumner, one of the partners, died, having appointed the plaintiff his sole executor. In 1801, by an indenture between the plaintiff, of the one part, and the surviving partners, Samuel Castell, Walter Powell the elder, Walter Powell the younger, and William Wilson, of the other part, the four surviving partners jointly covenanted with the plaintiff to indemnify him and his testator's estate from all the debts and engagements of the late co-partnership, and from all payments in respect thereof. In 1802, Walter Powell the elder died. In 1803, Wilson quitted the partnership. In 1804, Castell, and Walter Powell the younger (the two continuing partners) became bankrupt. In 1805, Wilson died. In 1806, a bill was filed by the parties interested under the marriage settlement, against the surviving trustee of that settlement, and against the bankrupts and their assignees, and against the representatives of all the deceased partners, to have the stock replaced, or for an account of the produce thereof, with interest from the time of the transfer. In 1809, an order was made in that cause, by which it was declared, that the present plaintiff, one of the defendants thereto, admitting assets of his testator, and the other defendants, the representatives of Powell the elder, and Wilson, were liable, out of the assets of their respective testators, to pay what should be found due for principal and interest, on taking the account thereby directed; and it was ordered that they should pay the same accordingly. The bill brought by the present plaintiff, after stating (among other things) *that Castell had since died an uncertificated bankrupt, and that Walter Powell the younger, having obtained his certificate, had become bankrupt a second time, but no assignment of his estate and effects had yet been executed; insisted that, by virtue of the deed of indemnity, he was entitled to be repaid, out of the estates of the two Powells and Wilson, all such sums as he had already paid, or should pay, under the said decree; therefore praying accordingly. The question was, as to the liability of Wilson's estate under the covenant in the deed of indemnity; and this depended on the effect of that deed, as constituting an obligation which, though only joint at law, would, as it was argued, be held in equity to be several as well as joint, and therefore binding on the estate of the deceased covenantor. Sir Wm. *Grant*, in delivering his judgment, said, "the question is, whether any other effect can be given to this covenant in equity, than it has at law. It has never been determined that every joint covenant is in equity to be considered as the several covenant of each of the covenantors. In the late case of *Devaynes* v. *Noble*, 1 Meriv. 563, I had occasion to examine the authorities on this subject; and found no such general proposition any where laid down. When the obligation

extended in equity beyond its legal operation, there being no ground on which to infer mistake in the nature of the instrument, and no previous equity entitling the covenantee to a several indemnity from each of the covenantors.

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Not a principal of equity, that every joint covenant shall be considered as if it were joint and several.

When the obligation exists only by virtue of the covenant, its extent is to be measured by the words. *Contra*, where the obligation is independent of the particular contract.

exists only by virtue of the covenant, its extent can be measured only by the words in which it is conceived. A partnership debt has been treated in equity as the several debt of each partner, though at law it is only the joint debt of all. But, there, all have had a benefit from the money advanced, or the credit given; and the obligation to pay exists independently of any instrument by which the debt may have been secured. So, where a joint bond has in equity been considered as several, there has been a credit previously given to the different persons who have entered into the obligation. It was not the bond that first created the liability to pay. But in this case the covenant is purely matter of arbitrary convention, growing out of no antecedent liability in all or any of the covenantors to do what they have thereby undertaken.

"Instead of winding up the partnership concern, and dividing what might remain, after satisfying all claims upon it, the parties make an arrangement by which Mr. Sumner was immediately to receive what was estimated to be his testator's share of the joint estate, he releasing to the other partners all interest in the residue. Why was Mr. Sumner's share of the partnership estate to remain unaffected by any claims by which that estate might afterwards be diminished? There was no equity that entitled him to demand from the other partners an engagement to that effect. But they are contented to give him a covenant of indemnity. As
[*191] it is only a joint covenant that is given, how can I say *that it is any thing more than a joint covenant that was meant to be given?

"It is not attempted to be shewn, that there was any mistake in drawing the deed, or that there was any agreement for a covenant of a different sort. There is nothing but the covenant itself, by which its intended extent can be ascertained.

"There is no ground, therefore, on which a Court of equity can give it any other than its legal operation and effect.—Bill dismissed without costs."

Where such intention appears on the face of the bond, it will be treated as a joint and several bond, although it be only a joint bond in form.

Reference to the Master, to inquire as to the intention of the parties.

Mistake by making a bond joint only, in-

Wherever there are circumstances appearing *on the face of the bond*, to shew that it was intended to be joint and several, though in point of form it be only a joint bond, there is no difference between a Court of law and a Court of equity; the former would consider it as a joint and several bond, as readily as the latter. But upon the head of mistake, a Court of equity would go further than a Court of law; and if an instrument was really intended to be different from what it appears to be, it is a very proper subject for the interference of the Court. Therefore, where the obligee made an affidavit that the bond was intended to be joint and several, the Master was directed to inquire whether the parties meant the bond to be so. *Ex parte Symonds*, 1 Cox, 200. Both in causes, and in bankruptcy, where there has been a joint bond, the Court has sometimes inferred, from the nature of the condition, and the transaction, that it was made joint by

mistake; and has rectified it, by decreeing in a cause, that a new bond should be executed, joint and several: and as the Court would so decree in a cause, it has ordered in bankruptcy, that proof should be made accordingly. *Underhill* v. *Horwood*, 10 Ves. 227.

stead of joint and several, rectified in equity.

If it be expressed in a bond, that two or more persons are jointly and severally bound, and one of them does not execute the bond, it is not the joint bond of those who executed it, but only the several bond of each. *Underhill* v. *Horwood*, 10 Ves. 212, 216, 225; *Elliot* v. *Davis*, 2 Bos. & Pul. 338. But if there were a severance of the obligation, *ut ante*, Vol. 1, p. 502; Vol. 2, p. 608; it seems that the obligation would be joint and several, as to those who executed. Lord *Eldon* says, "I had a notion, which, I think, was not correct, that where a man executes a bond, meaning that it should be the joint bond of himself and another, and not his several bond, it would not be his several bond. But the cases go farther. In such a case, however, unless there is something special, the man who had become so severally bound, has a right to have that bond delivered up; for *his intention was, not to become a mere several obligor†, but to be a joint and several obligor†; and the rights are different both in law and equity. For if he is only a‡ several obligor†, he has no remedies over against any one: but, if he is a joint and several obligor†, or only a joint obligor†, there is a right of contribution against the other sureties in equity, from the earliest times, and of exoneration from the principal. [See also *Ware* v. *Horwood*, 14 Ves. 34.] At law, the contract is perfectly different. The objection of the obligee, that a Court of equity should not interfere, must depend upon very special circumstances. There might be such a case: if for a great length of time acts had been done, amount-

If a joint and several bond be not executed by one of the intended obligors, it is only the separate bond of those who execute.

Where a man executes a bond, meaning it to be the joint bond of himself and another, who does not execute, it is the several bond of the former; but he may have it delivered up, being contrary to the intention.

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In equity, a joint and several, or a joint obligor, has a right of contribution against the other *sure-*

† In the report of the above case, *Underhill* v. *Horwood*, 10 Ves. 226, Lord *Eldon* stiles the person who becomes bound in a bond, to be an "obligee;" but as that is neither the technical nor popular acceptation of the word,—in the above extract the word "obligee" is altered to "obligor," in the five instances marked †. It is also rather remarkable, that Dr. Johnson defines an obligee to be "the person bound by a legal or written contract." But in the late valuable edition of Johnson's Dictionary, Mr. Todd has, with his usual discrimination, corrected the error; and defined an obligee to be, "the person to whom another, called the *obligor*, is bound by a legal or written contract." "The bond had been taken in the *obligee's* own name, and not in the King's." Sanderson, Cases of Consc. p. 85; see also Cowel's Interpreter, *verbo* "Obligor," and 2 Bla. Com. 340.

[An obligee is the person to whom another, called the obligor, is bound by a legal or written contract.]

‡ There is some ambiguity in this sentence. His Lordship's particular position cannot be supported. For, as to contribution, there is no difference, either at law, or in equity, whether the sureties are jointly or severally bound. See he next page.

ties, and of exoneration from the principal. Assignment of bond to a surety who pays it, is of no use: since even the principal may plead payment to action in name of obligee; but action on the case, or *assumpsit*, lies for surety, unless he has taken counter security, when he must bring his action on such security.

ing to a waiver of the objection." *Per* Lord *Eldon, Underhill* v. *Horwood*, 10 Ves. 225.

But although a surety may recover of the principal the sum he is obliged to pay, yet he cannot require an assignment of the bond for that purpose, *Gammon* v. *Stone*, 1 Ves. sen. 339, as it would be of no use to him. For if the co-obligor in the bond paid it off, the principal might take advantage of it, and plead payment in bar of an action instituted by the plaintiff in the name of the obligee, as it must be. *Bishop* v. *Church*, 2 Ves. sen. 372. The bond being given for the payment of one sum of money, when it is once satisfied to the obligee, it is *functus officio*. But if a surety pays money for a principal on a bond, having no counter bond, an action on the case lies for the surety, to recover the money from the principal; *Woffington* v. *Sparks*, 2 Ves. sen. *570; or he may bring an action of *indebitatus assumpsit* against him, under the implied contract. But where the surety will not rely on the promise which the law will raise, but takes a bond as a security, there he has chosen his own remedy, and he cannot resort to an action of *assumpsit*. *Toussaint* v. *Martinnant*, 2 Durnf. & East, 104. [*Vide* also, *post*].

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Co-sureties have remedy against each other at law,

for a contribution for the aliquot part of each.

And at law, one of several co-sureties in a bond may recover against any one of the others his aliquot proportion of the money paid by him under the bond; regard being had to the number of sureties; and even although the insolvency of the principal, and of the other sureties, be not proved; and this either the co-surety who pays, or his executors or administrators, may do by action of *indebitatus assumpsit*. *Cowell* v. *Edwards*, 2 Bos. & Pul. 268. See also *Deering* v. The Earl of *Winchelsea*, 2 Bos. & Pul. 270. There is, however, an objection to the action at law for a contribution, since there only the aliquot part, with reference to the whole number of co-sureties, can be recovered from each surety: therefore, if any of the sureties are insolvent, the plaintiff is to that extent deprived of his remedy.

In equity, insolvent co-sureties are struck out, and the rest contribute equally.

But in equity, it seems, that the insolvent co-sureties shall be struck out, and the rest shall contribute equally. *Peter* v. *Rich*, 1 Ch. Rep. 34; also cited Ibid, 151. *Hole* v. *Harrison*, 1 Ch. Ca. 246. *Swain* v. *Wall*, 1 Ch. Rep. 149. Ellis on Debtor and Creditor, 311. [*Browne* v. *Lee*, 6 Barn. & Cress. 689.] The doctrine of contribution amongst sureties is not founded on contract, but both at law and in equity it is founded on general principles of justice, on the ground of equality of burthen and benefit.

Sureties are liable to contribution, whether bound jointly, or jointly and severally, or severally by different instruments.

Therefore it makes no difference whether the sureties are jointly, or jointly and severally bound: nor will it make any difference if they are severally bound, and by *different* instruments, but for the *same* principal, and the *same* engagement: and though one person becomes a surety by a separate instrument, without the knowledge of another surety, it makes no difference. *Craythorne* v. *Swinburne*, 14 Ves. 165, 169.

If sureties give separate bonds, they contribute

There is, however, this distinction, that, where the sureties enter into separate bonds, the penalties of those distinct bonds will ascertain the propor-

tion in which they are to contribute; but, if they join in one bond, then they must contribute equally. *Deering* v. Earl of *Winchelsea*, 1 Cox, 323; 2 Bos. & Pul. 270, *S. C.* *Craythorne* v. *Swinburne*, 14 Ves. 165. In *Mayhew* v. *Crickett*, 1 Wils. Ch. Rep. 424, Lord *Eldon* says, "the right of contribution between sureties exists not only in cases where they are sureties by one and the same instrument, but also where they are constituted sureties by different instruments. The case of *Deering* v. The Earl of *Winchelsea*, in which that was first decided, certainly shook the notions which formerly prevailed in Westminster Hall on * the subject; and though I, at one period, was dissatisfied with that decision, I am now convinced that it was perfectly right." And see his Lordship's observations on the same case in *Craythorne* v. *Swinburne*, 14 Ves. 165, 169, 170; *Ware* v. *Horwood*, 14 Ves. 31. So, if one surety pays more than his proportion, there shall be a contribution for a proportion of the excess beyond the proportion which in all events he is to pay. *Ex parte Gifford*, 6 Ves. 808.

according to the respective penalties; if only one bond, they contribute equally.

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If one surety pays more than his proportion, the others must contribute.

However, although the right of contribution among sureties does not spring from contract, yet contract may qualify it, as in *Swain* v. *Wall*, 1 Ch. Rep. 149; where Swain, Wall, and Jorden, 16 Jac. became jointly bound in a bond of 500*l.* to the city of London, for the payment of 300*l.* in February then next; which 300*l.* was employed by one Shadwell for procuring the place of Serjeant-at-Arms; which place Shadwell afterwards assigned to one Hunt for good consideration; and Hunt, by the direction and agreement of Shadwell, Swain, Wall, and Jorden, entered into several counter-bonds unto Swain, Wall, and Jorden, for their indemnity from the bond of 500*l.* to the city of London. And thereupon it was agreed, that, if Hunt failed to pay the debt to the city, then Swain, Wall, and Jorden should pay their *respective parts* of the said debt to the city. Hunt died possessed of the place, insolvent. The city calling in the debt, and Wall not being able to pay his share, Swain and Jorden, in 1662, took up 300*l.* of Ducket and Bates, and were bound unto them in several obligations for re-payment thereof, and therewith paid the debt to the city. Afterwards Jorden became insolvent; and Swain, on behalf of himself, and Jorden and Wall, was forced to pay the 300*l.* to Ducket and Bates, and all interest. Wall being afterwards of sufficient estate to pay his rateable part of the 300*l.* and interest, paid by Swain, he filed a bill against Wall, praying that he might be decreed to pay him a *moiety* of the 300*l.* and interest, Jorden being insolvent; but the Court decreed Wall to pay only a *third part* of the 300*l.* and interest; and that, if the plaintiff had recovered or received any thing towards the third part of the debt and interest of the counter security before mentioned, he was to allow the same to the defendant. Therefore, as a party may by a special contract narrow his liability as co-surety, so he may by a special engagement contract so as not to be liable to contribute in any degree. *Craythorne* v. *Swinburne*, 14 Ves. 165, 170.

A co-surety may, by express contract, limit his liability, or avoid contribution altogether.

A subsequent surety for a principal and surety is not liable to contribution in favour of the first surety. [*195]

A distinction is also to be observed upon the liabilities and rights of a co-surety, whether he is strictly so, or whether he is only in the nature of a surety for the principal and the other surety. Thus, if a person give a separate bond as a supplemental security for payment of a * debt, in default of its being paid by the principal or his surety, under a former bond, he is not liable to contribution in favour of the first surety; such first surety being, as to the second surety, a principal. *Craythorne* v. *Swinburne*, 14 Ves. 160, 171. In *Cooke* v. ——, 2 Freem. 97, *S. C.* 2 Eq. Ca. Abr. 223, pl. 1, it is said, the Master of the Rolls seemed to think that the second surety should be liable for contribution to the first; but as there is no such judgment in the Register's book, the authority of that case is now over-ruled. 14 Ves. 167, 171.

In *Dunn* v. *Slee*, 1 J. B. Moore, 2, it was held that a surety in an indemnity bond, may bring an action of *assumpsit* for contribution against his co surety, although he had given a subsequent security to the obligees, under which he paid the sum conditioned in the bond, without the knowledge or consent of such co-surety.

Creditor giving time to principal, discharges surety.

But it has been held in the House of Lords, that, with respect to principal and surety in a bond, if the creditor enters into a binding contract with the principal debtor to give him further time to pay, without the concurrence of the surety, the surety is discharged, because the creditor has put it out of his own power to enforce immediate payment, where the surety would have a right to require him to do so. *Bank of Ireland* v. *Beresford*, 6 Dow, 238. And see *Eyre* v. *Bartrop*, 3 Madd. 221, *ante*, Vol. 1, p. 509. *Mayhew* v. *Crickett*, 2 Swans. 185, 1 Wils. 418, *S. C.* *Samuel* v. *Howarth*, 3 Meriv. 278.

[However, it has been held, that it is not any defence *at law*, to an action on a bond against a surety, that by a parol agreement time has been given to the principal. *Davey* v. *Prendergrass*, 5 Barn. & Ald. 187. *Note by Mr. B.*]

In order to discharge the surety, there must be a positive contract.

[And even in equity, there must be a distinct and positive contract to give time in order to discharge the surety. In a late case a letter from a clerk of the creditors applying for the payment of a bond debt as "falling due," on a day subsequent to that on which the bond became due, and which was urged as shewing the fact of a contract having been entered into to give time, was held not to have this effect, it not being proved to have been written with the concurrence of the creditors, and the facts charged being decided by the answer. *Heath* v. *Key*, 1 Younge & Jer. 434.

Taking a further security from principal, does not *per se* discharge a surety.

[And the taking a farther security from the principal of course does not discharge the surety, provided the creditor's remedy under the existing security be not thereby suspended. Thus, where A., as principal, and B., as surety, being indebted upon a promissory note, and the creditor calling for farther security, A. executed a bill of sale to him of his household goods, &c., in which the note was recited, and it was expressly declared to be

further security for the same debt, and there was a stipulation that A. should be allowed to continue in possession during his life, subject to have it determined on three days' notice at any time afterwards, whilst any part of the debt remained due. It was contended that this agreement gave time to the principal, and therefore discharged the surety; but the Court was of opinion, that the instrument in question did not give time to the principal; it was intended as a further security only; and reciting as it did, the existing security given by B. the defendant, as surety, it could not have been intended to operate as an extinguishment of all claims upon him. And the case of *Solly* v. *Forbes*, 2 Brod. & Bing. 38, was cited, as shewing that where the parties to a deed of security evince an intention that a pre-existing security shall remain in force, the new security has not the effect of extinguishing it. *Twopenny* v. *Young*, 3 Barn. & Cress. 208. (Upon the same principle the acceptance of a new bill as a collateral security, from the acceptor of a bill of exchange, does not discharge the drawer. *Pring* v. *Clarkson*, 1 Barn. & Cress. 14).

Nor does the creditor's delay to sue the principal.

[And the mere neglect or delay of the creditor to pursue his remedies against the principal, though coupled with the circumstance of taking an additional security, will not, it seems, form a ground for exonerating the surety.

[Thus, in a late case, a bill in equity was filed by a surety to be relieved from the payment of a bond debt, on the ground that the creditor had suffered five years to elapse without having taken any means to obtain payment from the principal, who, in the meantime, became insolvent, and fled the country. It was also alleged, that the creditor had discharged the surety, by taking the principal's bond alone for the money. It was determined, however, that these circumstances did not exonerate the surety; Lord *Lyndhurst* observing, that, "the surety has no right to say that he is discharged from the debt which he has engaged to pay, together with the principal, if all that he rests upon is the passive conduct of the creditor in not suing. He must himself use diligence, and take such effectual means, as will enable him to call on the creditor, either to sue, or to give him (the surety) the means of suing." *Eyre* v. *Everett*, 2 Russ. 381.

[It does not appear that, in this case, the surety had expressly called upon the creditor to sue the principal. Lord *Thurlow* seems to have thought, in *Ex parte Mure*, 2 Cox, 74, that, in such a case the creditor would be responsible; but the case (though referred to by Mr. Bythewood, *ante*, Vol. 1. p. 511, as an authority for the point) was different, the question being between a mortgagor and his mortgagee, to whom a bond had been assigned, and by whose negligence, in forbearing to sue, it was said, the debt had been lost. His Lordship adverted to the difference between the cases, and observed, that there was no pretence for equity in the case of sureties, if they lie by. This agrees with Lord

Lyndhurst's decision. It certainly would not be safe for a creditor to forbear to sue after receiving notice from a surety, calling upon him to do so; though, it is to be observed, in regard both to him (the surety) and the mortgagor of a debt, that he has always the means of taking the remedy into his own hands, by paying the debt. If, however, any of the securities for a debt be lost by the negligence of the creditor, as by neglecting to register the bill of sale of a ship, the surety is *pro tanto* discharged. *Capel* v. *Butler*, 2 Sim. & Stu. 457.

Contra, where security is lost by creditor's negligence.

[A surety may compel the principal to relieve him from his liability, by payment of the debt. See *Antrobus* v. *Davidson*, 3 Mer. 579.

Acceptance of a *cognovit* does not discharge surety, where.

[It has lately been held, that the acceptance of a *cognovit* by the creditor, in an action against the principal debtor, payable at a day earlier than that at which he could have obtained judgment in the action, did not discharge the surety: for, by this arrangement, time was not given, but the remedy was, in fact, accelerated. *Hulme* v. *Coles*, 2 Sim. 12.

[If the time be given to the principal, with the knowledge and assent of the surety, of course the latter is not discharged. *Tyson* v. *Cox*, 1 Turn. 395.

Creditor *may*, in giving time to principal, reserve his remedies against the surety.

[But it is clearly competent to a creditor, in giving time to the principal, to reserve his remedies against the surety; *Maltby* v. *Carstairs*, 1 Mann. & Ryl. 549; the effect of which is to qualify the agreement to give time; for, if the creditor sues the surety, the latter would have an immediate right of action against the principal, so that by this means the debtor becomes liable to the debt before the stipulated time. The reservation in question virtually therefore operates as a declaration, though I (the creditor) will not sue you (the debtor) before a given time, I will not preclude myself from immediately suing the surety, and thereby indirectly bringing the demand upon you at an earlier period. The intention, however, to reserve the remedies against the sureties must be clearly and unequivocally expressed; for where A. and B. gave a bond to certain bankers to secure advances to be made to A., and the bankers subsequently accepted from A. (the principal) a warrant of attorney payable by instalments, *without prejudice to any security they then held*, Lord *Eldon* was of opinion that this was not to be considered as referring to the bond, and as intended to preserve the remedies against the surety. *Boultbee* v. *Stubbs*, 18 Ves. 20. This is certainly a strong decision, for the words were clearly intended to have some operation in favour of the creditor, and, as it was important for him that the remedies against the surety should be kept alive, was it not reasonable to infer that such was the intent of them? Lord *Eldon* seems not to have been quite satisfied that a creditor *could* enter into a stipulation of the nature in question; but that point is now settled in the affirmative by the above cited case of *Maltby* v. *Carstairs*. The question, in point of principle, would seem to turn much upon the result of the enquiry, whether this contract between the principal and the creditor prevented the surety

But the intention must be unequivocally expressed.

from paying off the latter, and thereby having an immediate claim against the principal for the monies so paid; if it would, of course the surety ought to be discharged; but if it would not, he has no reason to complain, since his right to exonerate himself at any time from his liability, by compelling the creditor to receive his debt, remains unaffected. And the decision, that the remedy against the surety is unimpeached, where the stipulation in question is made, must be considered as proving that in such a case the surety has the right of immediately liquidating the debt; and the evident absurdity of supposing parties to enter into a contract for time, with a reservation which will in a certain event render it nugatory, seems to have induced Lord *Eldon's* determination in *Boultbee* v. *Stubbs*.]

The laches of obligee does not always discharge surety. Dividend received under principal's bankruptcy deducted, as against sureties, from penalty of bond.

However, where a bond was executed by an insurance broker, as the principal obligor, and two sureties; with a condition, that, if they should pay the obligees certain premiums which should become due for assurances on ships at sea, as should be made with the obligees by the insurance broker, and that within six months after the making the assurances, the bond was to be void. The broker became bankrupt, and was indebted to the obligees in a considerable sum for premiums; and they received a dividend of six shillings in the pound, under the commission. The premiums were due three years before the bankruptcy, and the obligees did not call on the sureties until after the bankruptcy. Held, first, that the sureties were not discharged by the laches of the obligees in suffering the credit of the broker to run on so long beyond the six months stipulated by the bond; and secondly, that the dividend received them by under the commission, was to be deducted, as against the sureties, from the penalty contained in the bond. *London Assurance Company* v. *Buckle*, 4 J. B. Moore, 153.

Surety discharged by fraud.

[It remains to be observed, that the concealment from the surety of any article in the agreement, by which his responsibility is varied, is a fraud upon him, and operates his discharge.

[Thus, where A. agreed to guarantee B. in the payment of 200*l.* value of iron to be delivered to C., and there was an agreement between B. and C., that C. should be charged 10*s. per* ton beyond the market price in liquidation of an old debt, it was held, that this stipulation, (which was not communicated to A.), was a fraud upon him, and vitiated the contract; since the effect was to compel B. to appropriate to the payment of the old debt, a portion of those funds, which the surety might reasonably suppose would go towards defraying the debt for the payment of which he had made himself collaterally responsible. *Pidcock* v. *Bishop*, 5 Dowl. & Ryl. 505, *S. C.* 3 Barn. & Cress. 605. See also *Jackson* v. *Duchaire*, 3 D. & E. 551].

Condition of a bond from one to one, for payment of money and interest.

(*e*) THE CONDITION of the above-written bond or obligation is such, *That* if the above-bounden (*f*) [*obligor*], his heirs, executors, or administrators, should well and truly pay, or cause to be paid unto the said [*obligee*] (*g*), his executors, administrators, or assigns, the full sum of —— pounds of lawful money of Great Britain and Ireland, with interest for the same after the rate of five pounds for one hundred pounds for a year (*h*), upon the —— day of

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SURETY.

(*e*) If there be a surety or sureties, it seems prudent to say,

"WHEREAS the above-bounden [*surety*] hath (*or* [*sureties*] have) agreed to join with the above-bounden [*principal*], in the above-written bond or obligation, subject to the condition hereunder written, as a surety (*or* sureties) for the said [*principal*], his heirs, executors, and administrators.

"NOW THEREFORE THE CONDITION" &c., *ut supra.*

TWO TO ONE.

(*f*) If there be two obligors, say,

"the above-bounden [*obligor*], and [*other obligor*], or either of them, their or either of their heirs" &c., *ut supra.*

THREE, OR MORE, TO ONE.

If there be three or more, say,

"the above-bounden [*obligors*], or any, or either of them, their, or any or either of their heirs" &c., *ut supra.*

TO TWO, OR MORE.

(*g*) If there be two or more obligees, say,

"[*obligees*], their executors, administrators, or assigns, the full sum" &c., *ut supra.*

Some gentlemen say,

"[*obligees*], or any or either of them, their, any, or either of their executors, administrators, or assigns, the full sum" &c.

Sed vide ante, p. 180, n. (*c*).

BY INSTALMENTS.

(*h*) If to be paid by instalments, say,

"in manner following: that is to say; the sum of —— pounds, on the —— day of —— now next ensuing; the sum of —— pounds on the —— day of —— then next following; and the sum of —— pounds on the

[*generally six months from the date*] now next ensuing, without any deduction or abatement whatsoever, *Then* the above-written bond or obligation shall be void, and of no effect, or otherwise shall be and remain in full force and virtue (*i*).

PAYMENT OF MONEY AND INTEREST.

SEALED AND DELIVERED, (being first duly stamped (*k*),) in the presence of

Attestation.

—— day of —— in the year 18—; *Together* with interest, after the rate aforesaid, on each of the said days of payment, for the said principal sum of —— pounds, or so much thereof as at or immediately before the payment of such instalments shall be due and owing, without," &c. *ut supra.*

(*i*) As to the penalty of a bond, *vide post*, p. 199, n. (*a*).

Penalty.

[(*k*) These words are now generally disused; indeed the introduction of them into the memorandum of attestation is very absurd, as they seem to imply that it is essential to the validity of a deed that it should be duly stamped before execution, which is not the case; it is enough that it appears to bear a sufficient stamp when offered in evidence.]

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INDORSEMENT *on a Bond whereby the Obligor* CHARGES *Freehold and Leasehold Premises with the Money and Interest secured by the Bond, and a Judgment: and* AGREEMENT *that he, his Heirs, &c., will, at the Obligee's Request, execute a Mortgage of the Premises.*

CHARGE AND AGREEMENT FOR MORTGAGE ON LANDS, INDORSED ON BOND.

I, the within-named [*obligor*], *do* hereby charge *All* my freehold and leasehold messuages, lands, tenements, and hereditaments, in ——, in the county of ——, with the payment of the sum of —— pounds and interest, secured

Charge by obligor on freeholds and leaseholds, of a sum and interest secured by bond and judgment:

CHARGE AND AGREEMENT FOR MORTGAGE ON LANDS, INDORSED ON BOND.

by the within written bond, and the judgment attending the same: And I promise and agree, that I, my heirs, executors, and administrators, shall and will, at the request of the within-named [*obligee*], his executors, administrators, or assigns, make, do, and execute all such acts and conveyances as the counsel of the said [*obligee*], his executors, administrators, or assigns, shall advise, for the more effectual charging the said premises, by way of mortgage, with the payment of the said sum of —— pounds, and interest. Witness my hand (*a*) this —— day of ——, 18—.

and agreement that he, his heirs, &c. will, at obligee's request, execute a mortgage of the premises.

(*a*) It seems prudent to add, "and seal." *Vide ante*, Vol. 2, p. 637, n. (*d*); p. 401; p. 588, n. (*d*); p. 633; p. 642.

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PAYMENT BY FOUR INSTALMENTS.

BOND *from one Obligor to two Obligees, for Payment of* 1,180*l.* *by Four* Instalments; *which the Obligees have agreed to take in full Discharge of a Debt of* 3,030*l.*, *if the Instalments should be regularly paid, but not on Failure thereof: and* Agreement *by the Obligor, that, if the Instalments are not duly paid, such Payments as shall be made shall only be a partial Discharge of the* 3,030*l.*

Obligation from one to two.

Know all men by these presents, *That* I, [*obligor*], of &c., am held and firmly bound to [*two obligees*], of &c., in the sum of 6,000*l.* (*a*), *ut ante*, pp. 179, 180.

Recital of obligor being indebted to obligees;

Whereas the above-bounden [*obligor*] is, and stands justly and truly indebted unto the above-named

Although the penalty of a bond be forfeited, yet a tender

(*a*) The penalty of a bond for payment of money is generally double the amount of the principal sum to be thereby secured. If the money be not paid at the time limited in the condition, the bond becomes for-

[*two obligees*], in the sum of 3,030*l.* of lawful money of Great Britain and Ireland. AND WHEREAS the above

his inability to pay;

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feited, or absolute at law. On the forfeiture of a bond, the whole penalty was formerly recoverable at law; but the Courts of equity interposed, and would not permit a man to take more than in conscience he ought; namely, his principal, interest, and expenses. And the like practice having gained some footing in the Courts of law, the statute 4 & 5 Ann. c. 16, s. 12 & 13, at length enacted, in the same spirit of equity, that, in case of a bond conditioned for the payment of money, the payment or tender of the principal sum due, with interest and costs, even though the bond be forfeited and a suit commenced thereon, shall be a full satisfaction and discharge. 2 Bla. Com. 341.

or payment of principal, interest, and costs, is a full satisfaction.

[In an action for a single breach of a bond, as in the case of a bastardy bond, if the defendant pays the whole penalty into Court, with costs, he is discharged from any further liability: for the bond ascertains the damage by consent of the parties, and therefore, if the defendant pays the plaintiff the whole stated damages, he cannot desire any more. *Brangwin* v. *Perrot*, 2 Wm. Bla. 1190; *Wilde* v. *Clarkson*, 6 Durnf. & East, 305. So on a bond conditioned for the payment of a yearly rent by a third person, the defendants are not, as sureties, liable for more than the whole penalty. *White* v. *Sealy* and others, 1 Dougl. 49. *Note by Mr. B.*]

Payment of penalty into Court discharges defendant from further liability.

Bond by surety for payment of rent, is only a security to the amount of penalty.

Mr. Justice *Buller* held, that interest beyond the penalty of a bond might be recovered in a court of law in the shape of damages. Lord *Lonsdale* v. *Church*, 2 Durnf. & East, 388. But that decision is now over-ruled; and the established principle is, that when money is secured by bond only, the penalty is the debt, both at law and in equity; *Clarke* v. *Seton*, 6 Ves. 415; and therefore a bond creditor cannot recover interest which with the principal will extend beyond the penalty of the bond: *Brangwin* v. *Perrot*, 2 Wm. Bla. 1190; *Wilde* v. *Clarkson*, 6 Durnf. & East, 303; *Gibson* v. *Egerton*, Dick. 409; *Kettleby* v. *Kettleby*, Ibid. 514; *Tew* v. The Earl of *Winterton*, 3 Bro. C. C. 489; *Knight* v. *Maclean*, Ibid. 496: excepting under special circumstances: 6 Ves. 416. [as, where it seems the amount of the sum secured and the penalty is the same. *Francis* v. *Wilson*, 1 Ry. & Mood. 105. And the same principle is of course applicable to bonds given to secure annuities, the arrears of which cannot be recovered beyond the penalty. See *Butcher* v. *Churchill*, 14 Ves. 575.]

Where money is secured by bond only, interest cannot be recovered beyond the penalty.

For instance; if a *judgment* be recovered on a bond, then, in an action on the judgment, interest may be recovered in damages beyond the penalty of the bond; and in this respect there is no difference between a foreign judgment (*ex gratia*, a judgment recovered in Ireland, &c.), and a judgment in a Court of record here. *M'Clure* v. *Dunkin*, 1 East, 436.

Interest may be recovered beyond the penalty, in an action on a judgment on the bond.

So, in equity, interest beyond the penalty was allowed to a judgment

In equity, there

PAYMENT BY FOUR INSTALMENTS.

bounden [*obligor*] is unable to fully satisfy and pay to the said [*two obligees*] the said debt or sum of 3,030*l.*; and therefore the said [*two *obligees*], at the earnest entreaty and solicitation of the above-bounden [*obligor*], have agreed to accept and take from the above-bounden [*obligor*], the sum of 1,180*l.* of lawful money of Great Britain and Ireland, payable by instalments, as hereinafter is mentioned, in full satisfaction and discharge of the said debt or sum of 3,030*l.*, provided the said sum of 1,180*l.* be regularly paid, as hereinafter mentioned; but in case of failure thereof, then the same is not to be considered and taken in full satisfaction and discharge of the said debt or sum of 3,030*l.*, but only of so much thereof as such payments as shall be made thereof will extend to pay.

and obligees' agreement to accept part by instalments in discharge of the whole,

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if the instalments are regularly paid; but not on failure thereof.

Condition of a bond from one to two, for pay-

NOW THE CONDITION of the above-written bond or obligation is such, that, in case the above-bounden

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are exceptions to the rule, that interest shall not be allowed beyond the penalty.

creditor, trustee in possession, under the will of his debtor, and as such applying the whole of the rents in the discharge of other debts, and not retaining any part for his own debt. *Atkinson* v. *Atkinson*, 1 Ball & Bea. 238. So, if the party be by injunction prevented from recovering his debt at law, while the demand was under the penalty; *Duvall* v. *Terry*, Show. P. C. 15; 6 Ves. 79; 2 Ves. jun. 93; or if an *elegit* creditor be called to an account in equity, the principal and interest may be recovered, although the interest carries the debt beyond the penalty. These instances are exceptions to the rule in equity, that a party shall not in the Master's office be allowed interest beyond the penalty, against the assets of a deceased debtor. 1 Ball & Bea. 239. Where a bond is only a collateral security, interest may be carried beyond the penalty. *Kerwin* v. *Blake*, 14 Vin. Abr. 460, pl. 4. So, interest will be given beyond the penalty of a bond, upon a mortgage for the same debt, though by a surety. *Clarke* v. Lord *Abingdon*, 17 Ves. 106. (See *Lloyd* v. *Hatchett*, 2 Anstr. 527, *contra*). Therefore, if a bond creditor also takes a promissory note with interest, he may recover interest beyond the penalty of the bond. 2 Ves. jun. 718.

"He that will have equity done to him, must do it to others."

So, if an obligor goes into a Court of equity for relief as plaintiff, although he submits to nothing, yet, by the mere circumstance of filing the bill, he would be taken to submit to every thing conscience and justice require: and, upon that principle, before granting the relief prayed for, the Court would compel him to pay the principal, interest, and costs occasioned by his delay. *Pulteney* v. *Warren*, 6 Ves. 92. But equity will never carry interest beyond the penalty, where there has been no demand for many years. *Gulway* v. *Russell*, 14 Vin. Abr. 460, pl. 2.

PAYMENT BY FOUR INSTALMENTS.

[*obligor*], his heirs, executors, or administrators, or any of them, do and shall (*b*) well and truly pay or cause to be paid unto the above-named [*two obligees*], their executors, administrators, or assigns, the full and just sum of 1,180*l.* of lawful money of Great Britain and Ireland, by instalments, and in manner hereinafter mentioned: that is to say; the sum of 295*l.*, part thereof, within six months next after the day of the date of the above-written bond or obligation (*x*); the further sum of 295*l.* within twelve *calendar months next after the day of the date of the above-written bond or obligation; the further sum of 295*l.*, within twelve calendar months next after the day of the date of the above-written bond or obligation; and the further sum of 295*l.*, to make up and complete the said sum of 1,180*l.*, within eighteen calendar months next after the day of the date of the above-written bond or obligation;

ment of a sum by four instalments.

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(*b*) "Do and shall," is not, in the above instance, grammatically correct; the proper expression is "should." *Vide ante*, Vol. 2, p. 599, n. (*b*).

[(*x*) Where a bond is given to secure a principal sum by instalments, and default is made in payment of any one of the instalments at the time appointed, as the condition is broken, the obligee may bring an action, and obtain judgment for the whole penalty; though the Court, it seems, would prevent his taking execution for more than is due. *Darby* v. *Wilkins*, 2 Stra. 957; *Masfen* v. *Touchet*, 2 Bl. 706. And the same rule applies where default is made in payment of interest before the time for paying the principal has arrived. Thus, where a bond was given by A. to B., in a penalty of 10,000*l.*, conditioned for the payment of 5,250*l.* on the 29th of September, 1820, with interest in the meantime, half-yearly: one of the half-yearly instalments of interest, which became due on the 29th of September, 1817, was not paid on the day; and, though the obligor offered a cheque in payment, on the 5th of November, the obligee's attorney refused to receive it, and commenced the present action. Mr. Justice *Bayley* had made an order, that, on payment of the interest due, with the costs, all proceedings should be stayed: but the Court discharged the order; Lord *Ellenborough* observing, that, "to what extent the Court might be disposed to relieve the defendant against the consequences of such a judgment, was another question; the plaintiff was entitled to proceed in this action, and the judgment must stand as a security." *Van Sandau* v. ——, 1 Barn. & Ald. 214. See also *Tighe* v. *Crafter*, 2 Taunt. 387, where a similar application was refused.]

Where condition is broken, obligee may obtain judgment for the whole penalty.

And the Court will not stay proceedings upon the payment of the sum due.

PAYMENT BY FOUR INSTALMENTS.

Then, and in such case, the above-written bond or obligation shall be null and void: *But*, in case of failure in payment of all and every or any of the several sums of money aforesaid, within the respective times aforesaid, the said bond or obligation is to, and shall, be and remain in full force and virtue.

Agreement by obligor, that, if instalments are not duly paid, such payments as shall be made, shall only be a partial discharge of the original debt.

AND the above-bounden [*obligor*] doth hereby expressly declare and agree (*c*), that in case of failure in making the several payments aforesaid, or any of them, within the respective times aforesaid, this bond, or any payment or payments to be made under the same, shall not be construed or taken as a satisfaction or discharge of the said debt or sum of 3,030*l.*, or of any further or other part *thereof, than so far as the money paid under this bond shall and will extend to pay and discharge the said debt or sum of 3,030*l.*

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Attestation.

SIGNED, SEALED, AND DELIVERED by the above-named [*obligor*] and [*obligees*] (being first duly stamped (*d*),) in the presence of

(*c*) As the obligees by the recital agree to take the sum secured by the bond as a discharge for the debt, they should sign the bond at least.

An agreement in a bond respecting some matter incident to the bond, does not require an agreement stamp.

(*d*) Notwithstanding the agreement at the end of the bond, an agreement stamp does not appear to be necessary, because it is a modification of the terms on which the bond is given. Thus, *In re Wansborough* v. *Dyer*, 2 Chit. Rep. 40, an objection was taken to the stamp on an arbitration bond, because, after all the usual clauses, a stipulation was inserted respecting the manner in which the costs should be paid. This was contended to be a substantive agreement, and required an agreement stamp: but the Court over-ruled the objection.

BOND *from One to One for Payment of the Principal Sum at the end of Eight Years; and for Payment of Interest thereon in the meantime Quarterly: but, if Default should be made in paying the Interest for Twenty-eight Days after each Quarterly Day, and after Demand, then the Whole of the Principal and Interest to become immediately due: with a* PROVISO, *that the Bond is given on Condition that Notice of every Assignment shall be given to the Obligor's Solicitors, or otherwise the Obligation not to become forfeited, nor any Assignee be entitled to demand Principal or Interest.*

PAYMENT OF PRINCIPAL AT END OF EIGHT YEARS, AND INTEREST IN MEANTIME.

KNOW ALL MEN BY THESE PRESENTS, *That* I, Peter Benjamin, Duke of ——, am held and firmly bound to [*obligee*], of &c., in the sum of 1,100*l.* &c., *ut ante*, p. 179.

Obligation from one to one.

THE CONDITION of the above-written obligation is such, that, if the above-bounden Peter Benjamin, Duke of ——, his heirs, executors, or administrators, should, on or before the (10th) day of (July), in the year 18—, well and truly pay, or cause to be paid, unto the above-named [*obligee*], his executors, administrators, or assigns, the principal sum of 550 pounds of lawful money of Great Britain; AND also should, in the meantime, and until the said principal sum of 550 pounds shall become due, and until the same, and every part thereof, shall be fully paid, well and truly pay, or cause to be paid unto the said [*obligee*], his executors, administrators, or assigns, interest after the rate of five pounds *per centum per annum* for the said principal sum of 550 pounds, or for so much thereof as shall from time to time remain due and unpaid, by equal quarterly payments, on the —— day of ——, the

Condition of a bond for payment of the principal sum at the end of eight years;

and for payment of interest thereon in the meantime quarterly;

PAYMENT OF PRINCIPAL AT END OF EIGHT YEARS, AND INTEREST IN MEANTIME.

—— day of ——, the —— day of ——, and the —— day of —— in every year, or within twenty-eight days [*204] *next after each quarter's interest shall become due; *Then* the above-written obligation shall become void, and of no effect: But, if default should be made in payment of the said principal sum of 550 pounds, or any part thereof, on the (10th) day of (July), 18—; or if default should be made in payment of the interest of the said principal sum of 550 pounds, or any part thereof, for the space of twenty-eight days next after each or any quarterly payment of such interest shall become due, according to the stipulations aforesaid (the same having been demanded by note in writing or otherwise); *Then* the said obligation shall be and remain in full force and virtue; and the whole of the said principal sum of 550 pounds, together with the interest accrued due in respect thereof, shall forthwith, and immediately after such default shall happen, become due and payable to the said [*obligee*], his executors, administrators, or assigns.

but, if default be made in paying the interest for 28 days after each quarterly day, and after demand, then the whole of the principal and interest to become immediately due.

Proviso that bond is given on condition that notice of every assignment shall be given to obligor's solicitors; or otherwise obligation not to become forfeited; nor any assignee be entitled to demand principal or interest.

Provided always, and the above-written obligation is given and executed upon this express condition, that, in case the said obligation, or the principal money and interest thereby secured, or any part thereof, should at any time hereafter be assigned, then every such assignment shall, within twenty-eight days from the date thereof, be produced and shewn to and entered in the office of [*obligor's solicitors*], of Lincoln's Inn, in the county of Middlesex (or such other person or persons as the said Peter Benjamin, Duke of ——, shall from time to time, by note in writing, or otherwise, direct), or otherwise the said obligation shall not become forfeited for non-payment of the said principal money or interest so to be assigned, or of any part or parts thereof respectively; nor shall any assignee or assignees thereof be entitled to call for or receive the principal money or interest assigned to him or them respectively.

PAYMENT OF MONEY LENT UNDER TESTATOR'S AUTHORITY TO TWO OF HIS EXECUTORS.

BOND *from Two Trustees and Executors of a Will to the Two other Joint Trustees and Executors, for the Payment of a Sum authorized by the Testator to be lent to the Obligors for a limited Period; and for Payment of Interest in the meantime, until Payment of the Principal; the Principal and Interest to be paid according to the directions of the Will.*

Joint and several obligation from two to two.

KNOW ALL MEN BY THESE PRESENTS, *That* we [*obligor*], of &c., and [*other obligor*], of &c. are held and firmly bound to [*obligee*], of &c, and [*other obligee*], of &c., in the penal sum of —— thousand pounds of lawful money of the United Kingdom of Great Britain and Ireland, to be paid to the said [*two obligees*], or to their certain attorney, executors, administrators, or assigns; *For* which payment to be well and truly made, we jointly bind ourselves, our heirs, executors, and administrators; *and* each of us severally, separately, and apart from the other of us, bindeth himself, his heirs, executors, and administrators, firmly by these presents; *Sealed* with our seals: DATED this —— day of ——, in the year one thousand eight hundred and ——.

Condition for payment into the Bank of a principal sum, authorized by a testator to be

THE CONDITION of the above-written bond or obligation is such, that, if the said [*two obligors*], or either of them, their, or either of their heirs, executors, or administrators, should well and truly pay, or cause to be paid (*a*)

Observations on the above condition.

(*a*) In the above instance, the testator authorized the obligees to lend the obligors a certain sum for a limited period, and required the obligees to take the obligors' bond for the money. The obligors being trustees and executors of the testator's will jointly with the obligees, the counsel who

PAYMENT OF MONEY LENT UNDER TESTATOR'S AUTHORITY TO TWO OF HIS EXECUTORS.

lent obligors for a limited period;

and for payment of the interest to testator's widow for her life; and after her death, into the Bank;

the principal and interest to be paid according to directions of will.

Short reference to will.

into the Bank of England, to the account of the personal representatives for the time being of the testator hereinafter named, the sum of —— thousand pounds of lawful money of [the United Kingdom of Great Britain and Ireland, current in] Great Britain; AND in the meantime, until payment of the said sum of —— thousand pounds, should pay to the said (*b*) [*first obligee*] (*c*), while living, and after her death, into the said Bank, to the like account as aforesaid, interest for the same —— thousand pounds, after the rate of five pounds for one hundred pounds for a year, and without any deduction or abatement whatsoever; *The* same sum of —— thousand pounds, and interest, to be paid at the times, and according to the purport and true intent and meaning, and for the purpose of the last will and testament (*d*) of [*testator*], late of, &c. deceased, the father of the above-bounden [*two obligors*], being a will bearing date on or about the —— day of ——, one thousand eight hundred and ——, and shortly after the decease of the said [*testator*], and on or about the —— day of —— last past, duly proved by the said [*two obligees*], and the above-bounden [*two obligors*], the executors thereof, in the Prerogative Court of Canterbury; *Then* the above-written bond or obligation shall be void and of no effect, or otherwise shall be and remain in full force and virtue.

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settled the draft of the above bond, thought it advisable that the payment should be made into the Bank. But as the propriety and the necessity of such a mode of payment appears to be doubtful, perhaps it might have been better to have followed the usual form; thus:

COMMON FORM. "unto the said [*two obligees*], their executors, administrators, or assigns, the sum," &c., *ut supra.*

COMMON FORM. (*b*) "[*two obligees*], their executors, administrators, or assigns, interest for the same," &c., *ut supra.*

(*c*) The first obligee was entitled to the interest of the residue of the testator's personal estate, out of which the sum was advanced.

(*d*) Many persons would, in the above instance, have recited every part of the will having any relation to the money authorized to be lent to the obligors; but it would be useless, for even then a general reference must have been made to the will.

BOND *by two Legatees under a Will for Payment of an* ANNUITY *to the Widow of the Testator, for her Life, with a Proportional Part to the Time of her Decease, pursuant to, and in Satisfaction of, a Condition on which the Bequest to the Obligors was made.*

TO PAY AN ANNUITY, PURSUANT TO THE CONDITION OF A BEQUEST.

KNOW ALL MEN BY THESE PRESENTS, *That* we [*obligor*], of &c., and [*other obligor*], of &c., are held and firmly bound to [*obligee*], of &c., widow, in the penal sum of 2,000*l.* of &c., *ut ante*, p. 179.

Obligation from two to one.

THE CONDITION of the above-written bond or obligation is such, that, if the said [*two obligors*], or either of them, their, or either of their heirs, executors, or administrators, should, during the natural life of the said [*obligee*], well and truly pay, or cause to be paid, unto the said [*obligee*], or her assigns, *One* annuity, or clear yearly sum of one hundred pounds of lawful money of [the United Kingdom of Great Britain and Ireland, current in] Great Britain, by half-yearly payments, to be made on the twenty-fourth day of June, and the twenty-fourth day of December, in every year, by even and equal portions, and clear of all deductions on any account whatsoever; AND should make the first half-yearly payment of the said annuity on the twenty-fourth day of June next ensuing the date of the said bond or obligation, provided the said [*obligee*] should be then living: AND in the event of the death of the said [*obligee*] between, or in the interval of any of the said half-yearly days of payment, and either before or after the said twenty-fourth day of June next; then if the said [*two obligors*], or either of them, their, or either of their heirs, executors, or administrators, should also well and truly pay or cause to be paid unto

Condition for payment of an annuity half yearly;

the first payment to be made on a certain day, if the obligee should be living;

and if the obligee dies in the interval of any of the days of payment, then a proportional part to the day of her decease;

TO PAY AN ANNUITY, PURSUANT TO THE CONDITION OF A BEQUEST.

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the executors, administrators, or assigns of the said [*obligee*], such part of the said annuity of one hundred pounds, *as shall be in proportion to the time or number of days which, inclusive of the day of the decease of the said [*obligee*], shall have elapsed prior to her decease, and after the day of payment next and immediately preceding that event; AND ALSO, if the said [*two obligors*], or either of them, their, or either of their heirs, executors, or administrators, should make the payment of such proportional part of the said annuity of one hundred pounds, as soon after the decease of the said [*obligee*] as demand shall be made thereof by the executors, administrators, or assigns of the said [*obligee*], and clear of all deductions whatsoever; (*Which* bond is given according to, and in pursuance and in satisfaction of, the intent and meaning of the last will and testament of [*testator*], late of &c., deceased, the father of the above-bounden [*two obligors*], bearing date on or about the —— day of, 18—, and shortly after the decease of the said testator, and on or about the —— day of —— last past, duly proved by the said [*obligee*] and [*another executor*], and the above-bounden [*two obligors*], the executors thereof, in the Prerogative Court of Canterbury;) *Then* the above-written bond or obligation shall be void and of no effect, or otherwise shall be and remain in full force and virtue.

such proportional part to be paid on demand, and clear of all deductions.

Statement that bond is given pursuant to testator's will.

Attestation.

SEALED AND DELIVERED in the presence of }

POST OBIT BOND (*a*), *with a Surety, for securing a Sum to a Purchaser thereof, if the Vendor should survire his Father or* (*b*) *Grandfather.*

CONTINGENT POST OBIT, WITH SURETY.

BOND in the penal sum of 5,000*l.* from [*principal*] and [*surety*], jointly and severally, to [*obligee*], *ut ante*, p. 179.

Obligation from two to one jointly and severally.

WHEREAS the above-named [*obligee*] hath contracted and agreed with the above-bounden [*principal*], for the

Recital of contract for purchase of 2,500*l.*

(*a*) There are two classes of *post obit* securities: in the first class, the payment of a greater sum than the sum advanced depends on a contingency: in the second class, the payment of a greater sum than the sum advanced is certain, but the time of payment depends on a contingency. The above precedent is an instance of the first class: the succeeding precedent is an instance of the second class.

Two classes of *post obit* securities.

USURY.

1st. A *post obit* security for payment of a greater sum than the sum advanced, if it depends on a *bonâ fide* contingency, is not liable to be impeached on the ground of usury. Hawk. Pleas of the Crown, ch. 82, sec. 16, p. 530, 6th ed.; and see *Wharton* v. *May*, 5 Ves. 27. Or, in the language of Mr. Justice *Burnet*, "a bargain on a mere contingency, where the reward is given for the risque, and not for the forbearance, is not usurious; for how can it be said, with any propriety, to be for the forbearance, when the day of payment itself may never come?" *Chesterfield* v. *Janssen*, 1 Atk. 340. If, therefore, a man gives or lends money, not to be repaid if the event should be one way, but double if the other, and it is uncertain which way it will happen, it is not within the statute. But if, under colour of such an hazardous bargain, the real treaty is for a loan, with an usurious reward for that loan, and a contingency is inserted to evade the statute, the contingency inserted is of little moment, being no

A *post obit* security, depending on a *bonâ fide* contingency, is not usurious.

But if the treaty be for a loan, and a colourable contingency be inserted, it is usurious.

(*b*) This bond being for payment of 2,500*l.* in consideration of 1,000*l.* and being also on a double contingency in favour of the obligee, it appears liable to the objection in *Curwyn* v. *Milner*, 3 P. Wms. 292, n., *post*, p. 220; unless that advantage was counterbalanced by the ill health of the obligor.

Primâ facie, the above consideration appears inadequate.

in the event of vendor surviving his father or grandfather:

purchase of the sum of 2,500*l.* to be paid to him the said [*obligee*], his executors, administrators, or assigns, in the

ingredient between the parties. The Court, or a jury, on the whole, may pronounce such a contract usurious, notwithstanding the colour of contingency, if they are satisfied the reward is given for the forbearance, not for the risk; as in adding a contingency, if a single healthy life should survive half a year: so they might as well add a contingency, if any one of six persons was alive at the end of six months; and one of the cases is, if any one of three persons is alive at that time. The intent of the bargain is the material thing: if that intent was borrowing the money, it is within the statute, whatever colourable contingency is inserted. For, if in truth the contract be usurious against the statute, no colour or shew of words will serve; but the party may shew it, and shall not be concluded or estopped by any deed, or any other matter whatsoever; for the statute gives averment in such case. *Burton's* case, 5 Co. 69 b; *Clayton's* case, 5 Co. 70; *S. C. Reynolds* v. *Clayton*, 2 And. 15; Moore, 397; *Mason* v. *Abdy*, Comb. 125; *S. C.* 3 Salk. 390, Carth. 67; and see *Mastin* v. *Abdee*, 1 Show. 8. But, where the principal was fairly and truly put in hazard, and such as none would run for the interest the law allows, there is no case where it has been held within the statute. *Chesterfield* v. *Janssen*, 2 Ves. 142, 143. The facts of that celebrated case were shortly these: The Honourable John Spencer, who was out of parental authority, and was then possessed of a large fortune, to which he expected a considerable increase upon the death of the Duchess of Marlborough, had contracted very heavy debts, which caused him to be much pressed for ready money. Accordingly, in May, 1738, in consideration of 5,000*l.*, paid to him by Sir Abraham Janssen, Spencer gave him a bond in the penalty of 20,000*l.* to pay to him 10,000*l.* in case he (Spencer) should outlive the Duchess. The age of Spencer was then thirty; that of the Duchess seventy-eight; but she was regarded as strong and healthy for her years; while he, by intemperance, had materially injured his constitution. In October, 1744, about six years after the making of the bargain, the Duchess died; and in December following, Mr. Spencer, being then unable to pay the 10,000*l.*, on the defendant's delivering to him the bond above mentioned to be cancelled, he executed a new bond, whereby he became bound to the defendant in the penalty of 20,000*l.* conditioned for payment to the defendant of 10,000*l.* with lawful interest, on the 19th of April then next; and at the same time executed a warrant of attorney to confess judgment on the bond, at the defendant's suit, for the 20,000*l.* penalty, on which judgment was entered. Afterwards, at two different times, Spencer paid two several sums of 1,000*l.* in part of the debt; and in June, 1746, he died. After Spencer's death, the defendant sued a *scire facias* against his executors for an execution, and they filed a bill in Chancery, on the ground

No estoppel as to usury.

Post obit bond to pay double the sum advanced if obligor survived another, held not usurious.

event of his, the said [*principal*], surviving either his father, [*father*], of &c., or his grandfather, [*grandfather*], of &c., CONTINGENT POST OBIT, WITH SURETY.

that the contract was unreasonable and usurious; praying for an injunction, and that the defendant might be adjudged a creditor of Spencer, *pari passu* with his other creditors, for so much of the 5,000*l.* as remained due, together with interest. The case was argued at great length before Lord Chancellor *Hardwicke*, who was on this occasion assisted by the Lord Chief Justice *Lee*, Sir *John Strunge*, then Master of the Rolls, Lord Chief Justice *Willes*, and Mr Justice *Burnet*. On the part of the plaintiffs, it was argued, that this was an usurious bargain; while, for the defendant it was insisted, that, as the 5,000*l.* was not to be paid at all events, but only in case Mr. Spencer survived the Duchess, the defendant ran the hazard of losing the 5,000*l.* and the interest which he might have made of it; and that therefore the case fell clearly within the doctrine laid down in *Sharpley* v. *Hurrel*, Cro. Jac. 208, and *Bedinfield* v. *Ashley*, Cro. Eliz. 741, and could not be considered as usurious. The whole Court gave their opinions *seriatim*, and agreed unanimously, that the bargain was not usurious. And see *Button* v. *Downham*, Cro. Eliz. 642; *Lamego* v. *Gould*, 2 Burr. 715.

If obligor pays part of expense of insuring life, on which contingency depends, contract may be set aside, on paying sum advanced, with interest, after deducting sums paid by obligor for insurance.

The only ground which takes such instances out of the application of the statutes against usury, is the risk of the principal lent; therefore, if the defendant be indemnified by an insurance on the life on which the contingency depends; of which insurance the obligor bears any part of the expense, although it be no part of the written contract, a Court of equity will order the bond to be cancelled, on payment by the plaintiff of the money actually advanced, and interest at 5*l. per cent.* from the time of its advancement, after deducting all sums of money paid by the obligor for insurance on his life. For the obligor ought not, either by a verbal agreement or understanding, or by the terms of the contract, to have any such obligation fixed on him in a *post obit* transaction; the risk to be run being the sole cause of the great difference in such matters, between the sum advanced, and the sum stipulated in a certain event to be received. *Evans* v. *Chesshire*, Belt's Sup. to Ves. sen. 311, 313; and see *Chesterfield* v. *Janssen*, 2 Ves. 142.

ADEQUATE PRICE.

One entitled to an estate after the death of two old lives, takes 350*l.* to pay 700*l.* when the lives fall, and mortgages the estate as a secu-

2dly. In the second class of *post obit* securities, the borrower secures to the lender a greater sum than the sum advanced, to be paid on the death of a particular person or persons, whether the borrower be, or be not then alive. Thus in *Batty* v. *Lloyd*, 1 Vern. 141, the defendant had agreed with the plaintiff, who was to have an estate fall to her after the death of two old women, to give her 350*l.* in consideration of being paid 700*l.* at the death of the two women; and the plaintiff was to secure this 700*l.* on a mortgage of her reversionary estate. It happened that both the women

payment of purchase money.

but not otherwise at or for the price or sum of 1,000*l.* AND WHEREAS, in pursuance of the said recited contract, he the

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rity, no relief against this bargain, though both the lives died within two years.

died within two years afterwards. And now the bill was, to be relieved against this bargain. *Sed non allocatur;* though the case of *Nott* v. *Hill* was cited, where relief was given in such a case as this; the plaintiff in that case being prevailed upon through his necessities. Lord Keeper *North* said, "I do not see any thing ill in this bargain. I think the price was the full value, though it happened to prove well. Suppose these women had lived twenty years afterwards; could Lloyd have been relieved by any bill here? I do not believe you can shew me any such precedent. What is mentioned of the plaintiff's necessities, is as in all other cases. One that is necessitous must sell cheaper than those who are not. If I had a mind to buy of a rich man a piece of ground that lay near mine, for my convenience, he would ask me almost twice the value: so, where people are constrained to sell, they must not look to have the fullest price: as, in some cases that I have known, where a young lady that has had 10,000*l.* portion, payable after the death of an old man, or the like, and she in the mean time becomes marriageable, this portion has been sold for 6,000*l.* present money, and thought a good bargain too. It's the common case; pay me double interest during my life, and you shall have the principal after my decease." But see *Berny* v. *Pitt*, 2 Vern. 14, *post*, p. 214. The case of *Gowland* v. *De Faria*, 17 Ves. 20, *post*, p. 215, also ranks under this class; for there the annuity was certainly to take effect, but the time when the payment of it was to commence, depended on a contingency; the only objection was inadequacy of consideration.

NO RELIEF AT LAW.

Courts of law will not facilitate an immediate execution on a *post obit* judgment.

Where judgment has not been entered within a year and a day, on a warrant of attorney given with a *post obit* bond, and the obligee does not apply to the Court for leave to enter it, till after the death of the person on whose death it is payable, the Court

Although Courts of *law* cannot relieve against a *post obit* security, on the ground of its being an unconscionable bargain, against which relief can be obtained in a Court of equity only; yet Courts of law will not facilitate an immediate execution on a *post obit* judgment. Thus, in *Lushington* v. *Waller*, 1 Hen. Bla. 94, on a motion to enter up judgment on a warrant of attorney, on an affidavit stating that a bond for 1,800*l.* was given by the defendant to the plaintiff in the year 1780, conditioned for the payment of 900*l.* (in consideration of 400*l.* advanced at the time of the execution of it), on the death of the defendant's father, in case the defendant should survive, together with the warrant: that the father died in September last, and the son was still living. But the Court said, that, in common cases, where judgment has not been entered on a warrant of attorney within a year and a day from the date, it was necessary to apply to the Court for leave to enter it; as this was a *post obit* bond, a security of a questionable nature, which had been often disputed with success, leave to enter up judgment ought not to be granted without a rule to shew cause. If judgment is entered immediately on giving the warrant, or within a

said [*obligee*], hath paid the sum of 1,000*l.* of lawful money of Great Britain, unto the said [*principal*], at, or

CONTINGENT POST OBIT, WITH SURETY.

year and a day after, transactions of this sort may probably be brought to the knowledge of the family of the obligor, and a guard raised against fraud and imposition. But if the obligee waits till the death of the father or relation, the Court will prevent his having immediate execution, by which he might force the obligor to submit to such terms as he should think proper to impose; and will require him to give due notice of his intention.

will not grant leave, without a rule to shew cause. A *post obit* bond is a security of a questionable nature.

RELIEF IN EQUITY, FOR INADEQUATE PRICE.

In a Court of *equity*, inadequacy of price is a sufficient ground for relieving against *post obit* securities, given by persons who have no present property, but only expectations from persons living; although there is nothing attending the contract which approaches to fraud or imposition. *Peacock* v. *Evans*, 16 Ves. 515. *Evans* v. *Griffith*, cited 17 Ves. 21, 24.

In equity, inadequacy of price is sufficient for relieving against *post obit* securities, by persons who have no present property.

he Court has gradually extended its protection; for at first the cases are, where there is express proof of gross practice, or actual imposition; from thence it went to cases where, on the face of the contract, it was so gross and unreasonable a contract between the parties, the Court, on presuming a man would not enter into it but by imposition, has relieved; of which, one case among many is *Nott* v. *Hill*, 1 Vern. 167. *Vide ante*, Vol. 1, p. 151, n. (*a*). As the mischief increased, the Court has extended its remedy. 2 Ch. Rep. 397. Where the bargain is so lucrative, and the person under necessity, so that the judgment of the Court has been, that necessity alone could induce him to make the contract, there has been relief. 2 Ves. 145. Thus in *Berney* v. *Pitt*, 2 Ch. Rep. 397; 2 Vern. 14, *S. C.* cited 2 Ch. Ca. 137, and corrected from the Register's Book, 3 P. Wms. 293, [D], the plaintiff's father being only tenant for life of a real estate, which after his death would come to the plaintiff, and the plaintiff's father allowing him but a small subsistence, he borrowed of the defendant two sums of 1,000*l.*, and gave two warrants of attorney to confess judgment for 5,000*l.* each, defeazanced for payment of 2,500*l.* each, if the plaintiff should outlive his father; and if the plaintiff should marry in his father's life-time, then he should from such marriage, during his father's life, pay the defendant interest for each sum of 2,500*l.* Lord *Nottingham* decreed the plaintiff to pay the defendant 5,000*l.* with interest. But Lord *Jefferies* reversed the decree, and ordered the defendant to repay the plaintiff what he had paid under the decree beyond the principal money and interest. 3 P. Wms. 293, [D].

Judgment in consideration of 2,000*l.* to pay 5,000*l.* *post obit*, and farther interest at 5 *per cent.* for father's life, if plaintiff should marry, relieved against.

A *post obit* bond given by an expectant heir, for payment of 600*l.* within a year after the death of his father, in consideration of 100*l.*, was relieved against on re-payment of the 100*l.* with interest. *Varnee's* case, 2 Freem. 63. And see Lord *Ardglasse* v. *Muschamp*, 1 Vern. 239. And in *Evans*

Bond to pay 600*l.* *post obit*, in consideration of 100*l.*, relieved against.

CONTINGENT POST OBIT, WITH SURETY.

before the sealing and delivery of the above written obligation; the receipt whereof accordingly the said [*princi-*

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v. *Griffith*, cited 17 Ves. 21, 24, the plaintiff was to repay four times the amount of the sum advanced, if he survived his father; although there was no fraud, yet the contract was set aside for inadequacy of consideration.

To expectant heirs, Chancery extends protection, approaching incapacity to bind themselves.

To expectant heirs, the Court of Chancery seems to have extended such a degree of protection, as nearly renders them incapable of binding themselves by any contract. *Peacock* v. *Evans*, 16 Ves. 514 In *Gwynne* v. *Heaton*, 1 Bro. C. C. 9, Lord *Thurlow* says, " there is a policy in justice protecting the person who has the expectancy, and reducing him to the situation of an infant, against the effects of his own conduct. The Court avows the disability but not the length to which it disables." Lord *Ardglasse* v. *Pitt*, 1 Vern. 239. Sir *William Grant* says, " the tendency of this doctrine to render all bargains with such persons very insecure, if not altogether impracticable, seems not to have been considered as operating to prevent its adoption and establishment: but, on the contrary, some judges have avowed that probable consequence, as being, to them, the recommendation of the doctrine. *Peacock* v. *Evans*, 16 Ves. 514.

The Court avows the disability, but not the length to which it disables.

The tendency of the doctrine to render such contracts insecure, some judges have thought a recommendation of it.

The principle is public policy, in order to prevent deception on parents and ancestors, and the impoverishment of young heirs; and to preserve the political influence of noble families.

It has been urged in favour of the doctrine, " that the ill tendency of heirs contracting with strangers to furnish their wants, is to make them quit a regular family life and dependency, to withdraw from advice and counsel of friends, and to have youth supplied with the means of gratifying their passions; and the bringing people together on the worst principles on which men may contract, avarice on one side, and a craving appetite on the other. The greediness of gain is the only principle on which a stranger can be induced to furnish a stranger; and the occasion of applying to a stranger is, because the wants are such as he would not reveal to his family; which tends to a delusion in what is of general concern—the provision for posterity." *Chesterfield* v. *Janssen*, 2 Ves. 144. And in the same case Lord *Hardwicke* says, " In most of these cases have concurred deceit and illusion on other persons not privy to the fraudulent agreement: the father, ancestor, or relation from whom was the expectation of the estate, has been kept in the dark; the heir or expectant has been kept from disclosing his circumstances, and resorting to them for advice, which might have tended to his relief, and also reformation. This misleads the ancestor; who has been seduced to leave his estate, not to his heir or family, but to a set of artful persons, who have divided the spoil beforehand." *Chesterfield* v. *Janssen*, 2 Ves. 157, 144; 1 Atk. 352, S. P.

[These contracts are set aside in consequence of their dangerous tendency to the commonwealth. For, the impoverishment of young heirs,

pal] doth hereby acknowledge. AND WHEREAS upon the treaty for the purchase of the said contingent sum of

and agreement that contingent sum should be

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by affording the means of prodigality, is certainly a political evil in this country more especially, in which the unbiassed and just influence of noble families forms an essential part of the constitution. To which may be added from the *senatusconsultum Macedonianum*, (so called from the usurer who gave occasion to it, and levelled against this practice) "*nullius posse filiifamilias bonum nomen expectatâ patris morte fieri.*" Dig. Lib. xiv. Tit. vi. 1, *in præfat.* But these contracts, when they await the decision of the Court, must depend on their special circumstances. It is not advisable to give too particular reasons for determining such cases. It might not perhaps be safe even to pass a new law: lest, by positively pointing out what contracts should be void, improper inferences should be drawn in favour of such as were, in some degree only, of a different description 3 Wooddeson's Vinerian Lectures, 461. *Note by Mr. B.*] *Sed vide ante*, Vol. 1, p. 151, n. (*a*).

Onus of proving fairness of bargain, lies on him who takes a *post obit* security

The person who takes a *post obit* security, has the *onus* thrown upon him of proving the fairness of the bargain. *Evans* v. *Cheshire*, 1803, 1806, Belt's Sup. Ves. sen. 300. *Bowes* v. *Jacobs*, 1808, 1 Madd. Ch. 122, 2nd ed. *Farmer* v. *Wardell*, cited 17 Ves. 2. *Coles* v. *Trecothick*, 9 Ves. 246. The principle and policy of the rule may be both equally questionable; *ante*, Vol. 1, p. 156; since usurers are thereby incited to insure themselves by their terms from the risk of the interference of the Court. Montesquieu says, "usury increases in Mahometan countries, in proportion to the severity with which it is prohibited: the lender indemnifies himself against the danger of having the contract rescinded." *Esprits de Loix*, liv. xxii. chap. 19. However, the settled doctrine of Courts of equity clearly lays the burthen of proving adequacy of price on the purchaser.

A rent-charge of 200*l. per ann.* granted in consideration of 1,500*l.* for 999 years certain, to commence on the death of a widow lady aged 57, set aside for inadequacy of price.

Thus in *Gowland* v. *De Faria*, 17 Ves. 20, where the plaintiff, in 1783, being entitled to the reversion of a considerable estate in fee simple, after the death of his mother, then aged fifty-seven, in consideration of 1,500*l.* he gave a bond and warrant of attorney to confess judgment, with a condition for paying to the defendant an annuity of 200*l.* for the term of nine hundred and ninety-nine years from the death of the plaintiff's mother, and demised the reversion for two thousand years, to a trustee, for securing the annuity, with a covenant to deliver up the title deeds on the death of his mother. The mother died in February, 1808; and the bill was filed in May following; charging that the defendant took advantage of the plaintiff's distress and inexperience; praying that the securities might be delivered up to be cancelled; and offering to repay the money advanced, with interest. Mr. Morgan, of the Equitable Assurance Office, by his deposi-

secured by bond of vendor and his surety.

2,500*l.*, it was agreed that the payment thereof, in the event aforesaid, should be secured by the joint and several

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tions stated, that the value of the annuity at the time of the grant, was 2,308*l.* For the defendant it was urged (among other points noticed in the judgment), that an expectant heir must look in that character to the person from whom he is to derive the estate: but that the plaintiff's father was dead, and the possession was only withheld during the life of his mother, under a limitation to her for life; and that the protection Courts of equity had given to that peculiar character, could not arise out of the mere relation of mother and son. In reply, for the defendant, it was urged, that any person having a reversionary interest to dispose of, is, in a Court of equity, an expectant heir, whether that interest is derived from a father or any other person; and that the ground of relief had always been, that he was dealing for a reversionary interest. Sir *William Grant*, in delivering one of his usually luminous judgments, said, "in considering the case of *Evans* v. *Peacock*, I found the doctrine of the Court perfectly established, that it is incumbent upon those who have dealt with an expectant heir, relative to his reversionary interest, to make good the bargain; that is, to be able to shew that a full and adequate consideration was paid. That is, undoubtedly, a heavy burthen imposed upon a purchaser: but, in that particular case, the burthen is imposed upon him; and that case is an exception to the general rule, that for mere inadequacy of value a contract is not to be set aside. In all these cases, the issue is upon the adequacy of the price. This is the case of a person who, in this Court, is considered as an expectant heir. He has charged his reversionary interest; the question is, whether he has received an adequate consideration. Upon that question the evidence is all one way. In many of these cases very opposite opinions are given by calculators: but here Mr. Morgan's opin ion is not contradicted. I must therefore take the value to be inade quate; and then I do not see how I can avoid setting aside the contract; unless the defendant can prevail, upon one of the other two grounds that have been taken: first, that after such a length of acquiescence the plaintiff ought not to be permitted to set aside the contract: secondly, that the value is to be calculated upon the result, and not as it might have been estimated at the moment of the transaction. As to the first, there is, I believe, no case in which, during the continuance of the same situation in which the party entered into the contract, acquiesence has ever gone for any thing: it has always been presumed, that the same distress which pressed him to enter into the contract, prevented him from coming to set it aside; that, it is only when he is relieved from that distress that he can be expected to resist the performance of the contract. As to the other ground, that, in the event which has happened, a very large price has been paid by the defendant, I apprehend I cannot take that into consideration.

A contract with an expectant heir forms an exception to the general rule, that for mere inadequacy of value a contract is not to be set aside.

Any person having a reversionary interest, is, in a Court of equity, an expectant heir.

During the continuance of the same situation of distress, acquiescence has no effect.

The value is to be estimated at the time of the transaction, not

bond of the said [*principal*], and [*surety*], as the surety for the said [*principal*].

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according to the event.

[*Nott* v. *Hill*, 1 Vern. 168, *in margine;* 2 Vern. 27.] In the case of *Evans* v. *Peacock*, (16 Ves. 512,) I am pretty certain, that I did not lay the least stress upon the circumstance, that the death of Evans, the father, happened in a very short period after the purchase: nor allow it to weigh against Peacock, as in any degree affecting the validity of the bargain. If the contract had been fair at the moment when it took place, the accident of its becoming more advantageous by the death of one of he parties would not, according to my opinion, have varied the character of the original transaction." His Honour, therefore, granted the prayer of the bill; and interest upon the money advanced was directed, at five *per cent.*, but compound interest was refused. 17 Ves. 26.

Interest at five *per cent.* upon the money advanced, compound interest refused.

COSTS.

On a bill for relief against a *post obit* security, and which is set aside for inadequacy, it seems the defendant is entitled to his costs.

As to *costs*, His Honour seemed disposed to make the same decree as he had made in *Evans* v. *Peacock*, 16 Ves. 518, where, though the contract was set aside, as it was not upon the ground of fraud, he gave the defendant his costs, considering him as a mortgagee; upon the authority of *Twisleton* v. *Griffith*, 1 P. Wms. 310, before Lord *Cowper:* but the question of costs was compromised in *Gowland* v. *De Faria*, 17 Ves. 27; *Innes* v. *Jackson*, 16 Ves. 356, cited 17 Ves. 26, does not appear to negative the defendant's right to costs in the above case, as supposed by Sir Samuel Romilly, the plaintiff's counsel. Indeed, as costs were allowed Dr. Jackson, so far as he was actually a mortgagee, *Innes* v. *Jackson* rather supports the right to costs in *Gowland* v. *De Faria*. The question as to costs in these cases, under ordinary circumstances, seems to be settled, and the doctrine of the Court further illustrated, by the case of *Bowes* v. *Heaps*, 3 Ves. & Bea. 117.

Unconscientious bargain to pay four times the money advanced on very slight risk, set aside on payment of principal advanced, interest, and costs.

There, the plaintiff was entitled in remainder after his two elder brothers, Lord Strathmore and George Bowes, under an intail, created by the will of their grandfather; and under the will of his grandmother was tenant for life in remainder of other estates after the estate for life of his brother George, with remainder to his first and other sons in tail; subject to a proviso, that, in case George Bowes, or any of his issue male, should come into possession of the other estates, the limitations as to them should cease, and those to the plaintiff should take effect. In 1804, the plaintiff being in great distress, proposed to raise the sum of 10,000*l.* by securing upon his expectancies four times the amount advanced. The defendants lent him money upon those terms; which was secured accordingly by bonds and indentures of demise, dated the 19th of March, 1804. The bonds having become absolute by the death of George Bowes, the bill was filed, praying an injunction against proceeding at law, and a declaration, that the instruments should stand as securities only for the sums

Condition for payment, if vendor should survive his father or grandfather.

NOW THEREFORE THE CONDITION of the above-written obligation is such, that, if the said [*principal*]

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actually advanced, with interest. In 1804, Lord Strathmore was at the age of thirty-five, and George Bowes thirty-two, both unmarried; and the plaintiff was twenty-seven, in good health and temperate; George Bowes being, from habitual intemperance, in extremely bad health. He was married before the advances of the defendant Phillips. The defendants admitted they were informed by the plaintiff's agent, that George Bowes was not in good health; denying any other knowledge of it. Sir *William Grant*, Master of the Rolls, in delivering his judgment, said, "It is fully proved by the evidence, that George Bowes was in a state of extremely ill health in February, 1804, and down to the time of his death. The plaintiff was in good health, and a temperate liver. The defendants admit that they were informed by the plaintiff's agent that George was not in good health; but they deny having any other knowledge of that fact. It is not imputed to them, that they used any endeavours to prevail upon the plaintiff to enter into this transaction. They merely acceded to the proposal that was made to them. It is not, however, every bargain, which distress may induce one man to offer, that another is at liberty to accept.

The mere absence of fraud does not necessarily decide upon the validity of the transaction.

The bargain being hawked about, only shews the distress of the borrower.

The mere absence of fraud does not necessarily decide upon the validity of the transaction; as is proved by many cases, from *Berney* v. *Pitt*, 2 Ch. Rep. 396, 2 Vern. 14, down to *Gwynne* v. *Heaton*, 1 Bro. C. C. 1. In the latter, Lord *Thurlow* says, "the defendant is not charged with misleading the plaintiff's judgment, or tampering with his poverty. In that case, too, as in this, the bargain had been hawked about, and offered to many persons. That," Lord *Thurlow* says, "only shews the distress of the borrower." If the contingency in this case had been merely that of the plaintiff's surviving his brother George, I should not have had a moment's hesitation in setting aside the contract, on the authority of many cases, where the gain was to be less, and the risk fully as great, if not greater.

The difference in point of health may be more than an equivalent for the difference in point of age.

The difference in point of health was more than an equivalent for the difference in point of age; which has materially weighed in several of the cases. It would not, I think, be endured, that a money-lender should take from a distressed man, dealing for his reversionary interest, an engagement to pay four for one, upon the contingency of a person, of the age of twenty-seven, in perfect health, outliving another of the age of thirty-two, debilitated by disease, and ruined in constitution by long continued habits of intemperance. But the contingency was, not merely George's dying first, but his dying without issue male. Whether any individual will marry and have issue, is an event not easily reducible to calculation; but a man in such a state of health as George Bowes is described to have been, was not, according to ordinary probabilities, likely to have children.

Relief against

The Court has not held, that a bargain depending on such a

should be living at the time of the decease of the said [*father*], or [*grandfather*], who shall first die; and in such

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contingency is wholly out of its reach. Lord *Ardglasse* v. *Muschamp*, 1 Vern. 237; *Wiseman* v. *Beake*, 2 Vern. 121, and *Barnardiston* v. *Lingood*, 2 Atk. 133, were cases in which death without issue male was the contingency upon which the lender, or purchaser, was to reap the stipulated advantage; yet the uncertainty of such a risk, did not prevent the Court's setting aside the bargain in each of those cases. It was urged in this case, that the risk of the defendant Phillips was greatly increased by the circumstance, that George Bowes was married at the time of Phillips's advances. Whether he then knew that fact, does not appear. The answer does not notice it as enhancing the risk. It is to be observed, that his first advance was seven months, his second a year, after the marriage. The knowledge of it at those periods would not, in all probability, have made him think the worse of his bargain. Besides, the death of George without issue was not the sole contingency upon which the lenders were to become entitled to their fourfold return. They had likewise the chance of his succeeding to his grandfather's estate. Allowing the risk to be still considerable, against that must be set the unusual amount of the stipulated return. Combining the two together, it seems to me, that there is more inequality in this bargain than existed in some of the cases in which the contract has been set aside. The agreement in *Perney* v. *Pitt*, [*ante*, p. 214,] was in consideration of 2,000*l.* advanced to pay 5,000*l.* within a month after his father's death, if the plaintiff survived his father; otherwise the money lent not to be repaid. That in *Curwyn* v. *Milner*, 3 P. Wms. 292, n., was for 500*l.* to pay 1,000*l.*, if the borrower survived his father *and*† father-in-law: but if he died before

an unconscientious bargain, upon the contingency of death without issue.

†In the argument of *Chesterfield* v. *Janssen*, 2 Ves. 140, it is said, and not contradicted by the plaintiff's counsel, that in *Curwyn* v. *Milner*, "it is mis-stated *and* instead of *or*." And see 1 Atk. 334. So Mr. Justice *Burnet* in delivering his opinion, says, "in *Curwyn* v. *Milner*, the contingency was double, to pay 1,000*l.* for the 500*l.* lent, if the son survived his father, *or* father-in-law." 1 Atk. 343. And therefore there was a double contingency *in favour of the lender*, which, no doubt, was the ground of the determination. If the statement of *Curwyn* v. *Milner*, in P. Wms. be correct, the case is opposed by *Batty* v. *Lloyd*, 1 Vern. 141, *ante*, p. 212; and seems to be over-ruled by *Chesterfield* v. *Janssen*. For, if the money was only to be paid in case the son survived his father *and* father-in-law, the risk was not equal, there being a double contingency *against the lender*, and consequently that could not be a ground for granting relief to the borrower. Besides, in *Chesterfield* v. *Janssen*, it was stated by the counsel, and by Mr. Justice *Burnet*, probably from their

In P. Wms. *Curwyn* v. *Milner* is mis-stated: the ground of the decision being the payment of double the sum advanced, on a double contingency in favour of the lender.

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case, if the said [*principal*] and [*surety*], or either of them, their, or either of their heirs, executors, or administrators,

either of them, the lender to lose the 500*l.* [The heir survived his father and father-in-law, and was relieved, though after he had paid the money, it being for fear of an execution.] I do not see how I can refuse to relieve in this case, consistently with the principles and decisions referred to, and approved by Lord *Hardwicke*, and the judges who assisted him, in the case of Lord *Chesterfield* v. *Janssen*, 2 Ves. 125; 1 Atk. 301; *Wharton* v. *May*, 5 Ves. 27. The defendants must have their principal and interest; and I am disposed to consider them so far in the nature of mortgagees, as to give them likewise their costs." *Gowland* v. *De Faria*, 17 Ves. 20; *Peacock* v. *Evans*, 16 Ves. 512.

Injunction restraining action on *post obit* bond in consideration of 1,000*l.* to pay 2,500*l.* if either of three sons should be alive at their father's death, being obtained on paying the 1,000*l.* advanced, and interest, into Court; a motion to dissolve injunction refused, with costs, on account of inadequacy of price, and the motion being

But, where an injunction, restraining an action on a *post obit* bond, in consideration of 1,000*l.* to pay 2,500*l.* if either of three sons should be alive at their father's death, having been obtained on paying the sum advanced, and interest, into Court, a motion by the defendant to dissolve the injunction, was refused, with costs, on account of inadequacy of price, and the motion being improperly made. Thus, in *Marsack* v. *Reeves*, 6 Madd. 108, a gentleman of the name of Marsack, eighty-two years of age, had three sons, between thirty and forty years of age, who being in want of money, borrowed 1,000*l.* of the defendant, and gave a bond to pay 2,500*l.* on the death of their father, provided one of the three sons should survive him. A bill was filed to have the bond delivered up, upon payment of the principal money, with interest; and for an injunction to restrain proceedings at law. An *ex parte* injunction was obtained, on payment of 1,000*l.*, and interest, into Court. A motion was made, upon the coming in of the answer, to dissolve the injunction. In support of the motion, it was observed, there was no fraud in the transaction: that the sons

having been present at the determination, being only nineteen years before, that, when Lord *King* decreed relief in *Curwyn* v. *Milner*, " he said, if it was new, he would not have gone so far, where such a contract was fair and done with open eyes; saying, he thought himself bound by precedents." 2 Ves. 140, 145. 1 Atk. 334, 343. Therefore, as his Lordship would not certainly have carried his determination an *iota* beyond the precedents, and as there is no determination that, when only double the sum advanced was payable on a double contingency *in favour of the borrower*, he has been relieved—the statement of *Curwyn* v. *Milner*, in P. Wms., cannot be correct. In *Roche* v. *O'Brien*, 1 Ball. & Bea. 357, the Irish Lord Chancellor, Lord *Manners*, mis-states the case: he says, " there, an expectant heir borrowed money, on condition to pay double the amount, if he survived his father." His Lordship also states it to be Mr. Cox's note, whereas it is a note of the original editor. See 7 Ves. 446.

should well and truly pay, or cause to be paid, unto the said [*obligee*], his executors, administrators, or assigns,

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were of an age to judge for themselves: that mere inadequacy is not sufficient to set aside a contract: that the principle and policy of the rules laid down as to expectant heirs and reversions, have been questioned: and that it was unconscientious in the sons to run the chance of dying before their father, and on his death to turn round upon the purchaser; treating the bond as valid or invalid, according to circumstances, and as best suited to their interests. *Whalley* v. *Whalley*†, 1 Mer. 436, and *Shelly* v. *Nash*, 3 Madd. 232, *ante*, Vol. 1, p. 154, were cited. Sir John *Leach*, the Vice-Chancellor, said, "It has long been a settled principle of courts of equity, that those who deal with persons who have no present property, and only expectations from persons living, possess so much advantage over those with whom they deal, that this Court will not permit a party so dealing to recover, unless he has given the actual value of the thing which he has purchased. Some late cases have extended this doctrine to reversions; (See *Peacock* v. *Evans*, 16 Ves. 512; *Gowland* v. *De Faria*, 17 Ves. 20); although reversions are as much property as property in possession. If any doubt belongs to this doctrine, as applied to reversions, it does not touch this case; for this is a case of mere expectations: it is out of all question here, that the sum paid was not the actual value of this bond; and these plaintiffs are therefore entitled to sustain the injunction." The motion being refused, the counsel for the plaintiffs said they were entitled to costs. His Honour observed, "If the defendant had succeeded in the motion, the costs would have been costs in the cause; but, having failed in the motion, it admits of a different consideration. In a case of *Marshall* v. *Lloyd*, which came on yesterday, I had occasion to consider the point; and I desired the registrar to ascertain the practice in such cases. I have a paper from Mr. Crofts, in which he states it to be the understanding of the registrars and clerks in court, that on a motion for an injunction, refused, and on a motion to dissolve an injunction, refused, the costs, as a general rule, are costs in the cause; but that, on special occasions, the Court deviates from that rule, and orders costs to be paid by the party that makes the motion." The counsel for the defendant said, *bills*, like the present, are always considered, in effect, as

improperly made.

On a motion for an injunction refused, and on a motion to dissolve an injunction refused, the costs, as a general rule, are

† In *Whalley* v. *Whalley*, 1 Meriv. 436, a conveyance of a reversionary interest from an uncle to a nephew, under circumstances of gross inadequacy of price, and alleged fraud, was attempted to be set aside, after forty years; but the Court held it to be supported by the consideration of natural love and affection, inserted in the witnessing part of the deed, although the recital of the contract for the sale, only stated the consideration to be pecuniary.

Consideration of natural love and affection inserted in *testatum*, held to support a deed, although not mentioned in recital.

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within six calendar months next after the decease of such of them, the said [*father*] and [*grandfather*], who shall

costs in the cause; but on special occasions the Court deviates from that rule.

bills to redeem, and the plaintiff pays the costs of the suit. But his Honour replied, "it is for that reason that I am disposed to give the costs of this *motion* to the plaintiff. Unless specially given to the plaintiff, the defendant will receive them as costs in the cause; but it is not reasonable that the plaintiff should pay the costs of a motion improperly made by the defendant. The motion must be dismissed, with costs."

Post obit bonds of a young man put up by him for sale by auction, without reserve, relieved against.

If the consideration for which a *post obit* bond is to be granted, is ascertained by means of a *sale by auction, without reserve*, it seems that the Court will extend its relief. Thus, in *Fox* v. *Wright*, 6 Madd. 111, on a bill to be relieved from certain *post obit* bonds, Sir John *Leach* said, "The true effect of the case of *Shelly* v. *Nash* (3 Madd. 232; *ante*, Vol. 1, p. 154), is, that every purchaser at a sale by auction of a reversion, is not necessarily bound to establish that he purchased at a full price. That he may purchase under circumstances which make it as equitable that he should have the benefit of his bargain, without such proof, as if he had bought, not a reversion, but an estate in possession. The question is, whether the present defendant purchased this *post obit* bond under such circumstances. The particulars of sale disclose, that the vendor was a young man, about to raise a sum of 40,000*l.* upon *post obit* bonds, payable at the death of his father, and that the sale of these bonds was to take place without reserve; that is, without any bidding on his part. Those who attended this auction, necessarily, therefore, knew that the vendor was a young man in distress; that he was so much pressed for money, that he undertook with those who thought fit to be bidders, that he would not have recourse to those precautions by which every provident seller at an auction protects himself against an inadequate price; and I have to ask myself, in the language of the case of *Shelly* v. *Nash*, whether it can be considered that such a vendor is not, in some sense, in the power of those who deal with him. And whether a sale by auction, under such circumstances, affords fair evidence of the market price. At all events, the question in this cause is of too much importance to be decided incidentally, upon this motion; and I must continue this injunction till the hearing, upon the terms of the plaintiff bringing into Court the auction price, together with interest, at five *per cent.*, from the time of payment."

EQUITY WILL NOT ALWAYS GRANT RELIEF.

Where hazardous bargains with heirs or others are fair, equity will not set them aside.

From the cases which have been stated, it appears that hazardous bargains with heirs or others, to have double or treble the value of the sum lent, after the death of their father, or a tenant for life, or some other contingency, are not always set aside in a Court of equity, for they may be fair; and that it is only upon the circumstance of fraud, or being extremely unreasonable, that they can be overthrown. But, that always where they

first die as aforesaid, in the life-time of the said [*principal*], the sum of 2,500*l.* of lawful money of Great Britain;

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are set aside, though for fraud, the plaintiff must restore to the defendant the money paid, together with interest, according to that maxim in equity, "He that will have equity done to him, must do it to others." Francis's Maxims, I. (7). But, if the case be fraudulent, and the obligee applies to a Court of equity as plaintiff, he will have no assistance, not even to recover what was really lent. For, in equity, there is another maxim, that, "He who hath committed iniquity shall not have equity." Francis's Maxims, II. 1 Eq. Ca. Abr. 90, (G), (*a*); 276, (*a*). 1 Fonbl. Treat. Equity, 25, 140. The same doctrine prevails in equity, if a contract be infected with an usurious consideration. *Mason* v. *Gardner*, 4 Bro. C.C. 436; [*Scott* v. *Nesbitt*, 2 Cox, 183]. But, from the case of *Priestly* v. *Wilkinson*, 1 Ves. jun. 214, the general principle of not extending relief to the lender, when he is plaintiff, seems to be rather shaken. There, the contract was fraudulent; and it was also unreasonable and unequal, being to pay ten for one, on what had been previously held a colourable contingency. *Vide ante*, p. 209. Besides, only a small part of the consideration money was really paid, and it was only a verbal contract, principally supported by the plaintiff's own evidence. The facts were these: Priestly filed a bill against the executors of Robert Dennison, praying to have an annuity of 100 guineas secured to the plaintiff out of the assets of Dennison, or to have the sum of 500 guineas paid to him. It stated that the plaintiff was Dennison's apothecary, and that Dennison, being very low spirited, and *fancying* himself to be in a very bad state of health, told the plaintiff, during one of his visits, that he was sure plaintiff would not insure his life for a year; upon which an agreement took place between them, by which the plaintiff was to pay Dennison 10 guineas then—to receive 100 if Dennison should be alive upon the first of January, 1784; and plaintiff gave him a promissory note accordingly. Dennison offered to enlarge the agreement to 50 guineas to receive 500, upon the same terms, which was agreed to; and it was farther agreed, that, in case the plaintiff should become entitled to the 500 guineas, he would take an annuity of 100 guineas instead. Plaintiff offered evidence to prove the consideration of 50 guineas had been paid in this way; *viz.* the promissory note for 10 guineas—about 30 due to him for medicines, &c. and 10 guineas paid—and that Dennison had said, he had received 50 guineas from the plaintiff. The executors, who proved the will, admitted assets, and offered to pay the bill for medicines, but denied knowing any thing of this agreement, and offered evidence that Dennison had said he had been entrapped into taking 10 guineas, but that he had returned them. Lord *Thurlow* (without hearing the evidence), said, "It is impossible for me to entertain such a bill as this. He could do nothing upon it at law. If he goes to law, he will lose the whole.

If *post obit* be set aside, plaintiff must restore the money paid, with interest.

"He that will have equity done to him, must do it to others."

"He who hath committed iniquity shall not have equity."

Apothecary gave his patient 50 guineas, to receive 500, or an annuity of 100, if he should survive a year, which he did: bill against executors dismissed, as plaintiff could not succeed at law; but without costs, on account of the money actually advanced, which must have been repaid upon a bill to set aside the agreement.

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Or in case the said [*principal*] should happen to depart this life in the life-time of them the said [*father*] and

But I think the money actually advanced ought to be paid back; it is hard and inequitable to refuse that; for, if the bill had been to set this aside, the money actually advanced must have been repaid. But that is the utmost I can do; for this is not a bargain a man should gain by. Let the bill be dismissed, without costs." *Priestly* v. *Wilkinson*, 1 Ves. jun. 214.

CONFIRMATION.

Valid confirmation, *post obit*, bars relief on *doubtful* bargain.

If, on the death of the person upon whose decease the money is payable, the transaction is *confirmed*, and if the confirmation be free from the qualifications hereafter stated, then it cannot be set aside; nor can relief be had, except as to the penalty. *Chesterfield* v. *Janssen*, 2 Ves. 158; 1 Atk. 354. For a new agreement may confirm what was at first an unreasonable or a *doubtful bargain*. *Ibid.* *Cole* v. *Gibbons*, 3 P. Wms. 294.

A husband having caught a man in bed with his wife, the man gave the husband a note for 100*l.* for fear of being killed, and afterwards, when freed from duress, gave a bond for the 100*l.*, equity would not relieve against the bond.

The strongest instance of a confirmation of a voidable security, against which the Court refused relief, is the following *Anonymous* case, 3 P. Wms. 294, [E.]: A man was caught in bed with another's wife; and the husband, who caught him, having a sword in his hand, was about to kill the man, who was naked, and in the power of the husband. But upon the man's desiring the husband not to take that advantage of him, and saying that he would make him reparation, thereupon they went into another room, where the man gave the husband a note for 100*l.* payable at a certain time. After which, the money growing due, the husband came for payment, and the man, excusing payment, gave his bond for the money, and afterwards brought his bill to be relieved. The Lord *Cowper* declared, that if the matter had rested on the note, which was gained by a man armed, from one naked, and by duress, though it happened to be given in satisfaction for the greatest injury (in which case, however, the utmost remedy the law would have given, had been damages, to be ascertained by a jury), he should have made no difficulty of granting relief; but when afterwards the plaintiff had coolly, and without any pretence of fear or duress, entered into a bond to the husband, he had thereby himself ascertained the damages, and ought not to be relieved.

But a confirmation of *void* security is inoperative.

However, a new agreement, or bond, after the money becomes due, will not confirm a security which was originally *void*. Therefore, if, in *Chesterfield* v. *Janssen*, the first bond had been void by the statutes of usury, no new engagement would have made it better: the original taint would have infected it. 2 Ves. 158. See also *Bosanquet* v. *Dashwood*, Cas. temp. Talb. 38. *Jacques* v. *Golightly*, 2 Wm. Bla. 1073. *Cannan* v. *Bryce*, 3 Barnw. & Ald. 185; *post*, p. 256.

[As to the effect of taking an usurious security for a subsisting legal debt see *Phillips* v. *Cockayne*, 3 Camp. 119; *Preston* v. *Jackson*, 2 Stark. 237].

[*grandfather*]; *Then* this present obligation to be void; or else to be and remain in full force and virtue.

Nevertheless, the debtor is obliged, in natural justice, to pay the principal and *legal* interest. *Ante*, p. 224, 217. But, for all above legal interest, equity will assist the debtor to retain, if not paid: or an action will lie to recover back the surplus, if the whole has been paid. *Smith* v. *Bromley*, 2 Dougl. 697. [A Court of law will set aside a judgment on the ground of usury, without imposing on the defendant the terms of paying the principal and interest. *Roberts* v. *Goff*, 3 Barn. & Ald. 92.]

On usurious contract, debtor must pay principal and *legal* interest.

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In equity, confirmations of deeds are looked upon with jealousy. 1 Madd. Ch. 122, 2d ed. 1 Fonbl. Treat. Equity, 141, (*r*). Therefore, if the confirmation be not freely given, if the party be poor or distressed, or involved in difficulties, *Crowe* v. *Ballard*, 2 Cox, 257; *Shirley* v. *Martin*, cited 1 Ball & Bea. 358-9; 3 P. Wms. 75; 1 Fonbl. Treat. Equity, 264, n. (*s*); 11 Ves. 536, 537; 9 Ves. 299; or under an influence of terror or apprehension from the original transaction, or while he considers the bond is valid, or himself under a legal obligation, though the opinion be unfounded; *Crowe* v. *Ballard*, 1 Ves. jun. 220; *S. C.* 3 Bro. C. C. 120; 2 Cox, 257; or if he is not fully apprised of his right to impeach the security; *Dunbar* v. *Tredennick*, 2 Ball & Bea. 317; *Cann* v. *Cann*, 1 P. Wms. 727; *Roche* v. *O'Brien*, 1 Ball & Bea. 339; and that his act will operate as a confirmation; *Murray* v. *Palmer*, 2 Scho. & Lefr. 486; or if there appears to have been the least fraud or surprise in procuring it; *Cole* v. *Gibbons*, 3 P. Wms. 294; or any *suppressio veri, aut suggestio falsi;* 3 Inst. 238; then, it is not an effectual confirmation. Upon the same principle, in *Curwyn* v. *Milner*, 3 P. Wms. 293, *ante*, p. 220, the money being paid for fear of an execution, it was not considered as a confirmation; but the defendant was ordered to repay the surplus beyond the principal and interest. And it should be remembered, that he who, undertaking to give information, gives but half information, in the doctrine of Courts of equity, conceals. *Walker* v. *Symonds*, 3 Swanst. 73.

If the party remains poor, or is unapprised of his right to relief, nothing he does will operate in confirmation.

Imperfect information equivalent to concealment.

ASSIGNEE.

Whoever takes an assignment of a bond, being a *chose in action*, takes it subject to all the equity in the hands of the original obligee; *ante*, Vol. 2, p. 327; but length of time and circumstances may vary that liability, and make *the case of an assignee for valuable consideration stronger. Therefore, if a *post obit* bond be given, and the obligor and obligee die, as well as the person on whose life it was given, and the bond has been assigned, the usual relief will not be granted without proof of imposition. *Hill* v. *Caillovel*, 1 Ves. 122; *ante*, Vol. 1, p. 152. The consideration originally advanced is not stated in the report.

Assignee of a bond takes it subject to all equity; but time and particular circumstances, if there be no proof of imposition, may vary his liability.

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DEFEAZANCE ON WARRANT OF ATTORNEY TO SECURE A POST OBIT BOND.

[DEFEAZANCE (*a*) *on a Warrant of Attorney for securing a Post Obit Bond.*

MEMORANDUM that the within-written warrant of attorney and the within-mentioned bond or obligation are given as a security for the payment by the within-named [*obligor*], his heirs, executors, or administrators, of the sum of 3,000*l.* of lawful money of Great Britain to the within-named [*obligee*], his executors, administrators, or assigns, if the said [*obligor*] should be living at the time of the decease of his father [*father*], of ——, in the county of ——. The same sum to be paid within three calendar months, next after the decease of the said [*father*]. And it is hereby declared and agreed that no execution or executions shall be issued or taken out upon the judgment to be entered up under the within warrant of attorney, unless the said [*obligor*] should be living at the time of the decease of the said [*father*]; and, in that event, unless or until the whole or some part of the said sum of 3,000*l.*, shall be unpaid by the space of three calendar months next after the decease of the said [*father*]. AND ALSO that, in case the said [*obligor*] should be living at the time of the decease of the said [*father*], and the said sum of 3,000*l.*, or any part thereof, shall be unpaid for the space of three calendar months next after the decease of the said [*father*], then, and in such case, it shall and may be lawful for the said [*obligee*], his executors, administrators, or assigns, to sue out such execution or executions upon or by virtue of the said judgment, as he or they shall think fit, or be advised for the recovery of the said sum of 3,000*l.* or so much thereof as shall be then due, and all the costs, charges, damages, and expenses, which he the said [*obli-*

(*a*) This precedent was intended by Mr. Bythewood to be added to the present edition.

gee], his executors, administrators, or assigns, or any of them, shall bear, pay, sustain, or be put unto, for or by reason or means of the non-payment of the same sum, or any part thereof. And also that, in case the said [*obligor*] should not be living at the time of the decease of the said [*father*], or in case the said [*obligor*] should be living at the time of the decease of the said [*father*], after full payment to the said [*obligee*], his executors, administrators, or assigns, of the said sum of 3,000*l.*, and of all such costs, charges, damages, and expenses as aforesaid, he the said [*obligee*], his executors, administrators, or assigns, shall or will, on the request, and at the costs and charges of the said [*obligor*], his heirs, executors, administrators, or assigns, acknowledge satisfaction on the said judgment, upon the record thereof in due form of law, and do any further or other act, matter or thing, which may be reasonably required, for releasing and extinguishing all right and remedy under the said judgment, and all executions thereupon, so as for the doing thereof the said [*obligee*], his executors, administrators, or assigns, shall not be compelled, or compellable to travel from the place or places of his or their then residence or abode.

(To be signed by) [*Obligor*].

Witness [*Obligee*].]

POST OBIT CERTAIN, BUT REDEEMABLE.

BOND *in consideration of a Release of a Debt for paying a Sum* POST OBIT *the Obligor's Uncle, whether the Obligor be or be not then alive: the Sum secured being totally or partially redeemable in the interim.*

Obligation from one to one.

BOND from [*obligor*] to [*obligee*], in the sum of 30,000*l.*, *ut ante*, p. 179.

Recital of obligor being indebted to obligee:

that he will not be able to pay the debt till his uncle's death:

that he hath proposed obligee shall release debt, in consideration of obligor, his heirs, &c. paying a sum *post obit* his uncle; but to be redeemable totally or partially during uncle's life:

WHEREAS (*a*) the above-bounden [*obligor*] is (*b*) justly indebted to the above-named [*obligee*], upon the settlement of all accounts between them, up to the day of the date of the above-written bond, in the sum of 8,230*l.* AND WHEREAS the said [*obligor*], according to the present state and prospect of his circumstances, will not be able to pay and discharge the same sum, until the decease of his uncle, the Right Honourable [——] Lord [——]. AND WHEREAS the said [*obligor*] hath proposed to the said [*obligee*], that the said [*obligee*] shall release the said [*obligor*] from the said sum of 8,230*l.*: AND that in *consideration thereof, the said [*obligor*], his heirs, executors, or administrators, shall and will, within six calendar months next after the decease of the said Lord [——], pay to the said [*obligee*], his executors, administrators, or assigns, the sum of

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[(*a*) If the money is advanced under a contract for a purchase of the sum *post obit*, recite *ut ante*, p. 209. *Note by Mr. B.*].

Observation on the above recitals.

(*b*) It appears inconsistent to say that the obligor "is indebted," and subsequently to say that he has been released from the debt. Perhaps it would be more correct to say, in the first recital,

"WHEREAS the above-bounden [*obligor*] was, previously to the execution of the release hereinafter mentioned, justly indebted," &c. "up to the day of the date of the same release, in the sum," &c.

and then make the other recitals in the past tense.

16,500*l.*; *but* with such liberty for the said [*obligor*] to buy up such expectant sum, or any part or parts thereof, at any time or times during the life of the said Lord [——], as hereinafter expressed. AND WHEREAS the said [*obligee*] hath acceded to the said proposal: AND, in pursuance thereof, on his part, he hath, by a deed poll or writing, bearing (*c*) date the day next before the day of the above-written bond, released and discharged the said [*obligor*] of and from the said debt or sum of 8,230*l.*; and all actions, suits, claims, and demands, in respect thereof.

POST OBIT CERTAIN, BUT REDAEMABLE.

and that obligee hath acceded thereto, and released the debt.

NOW THEREFORE THE CONDITION of the before-written obligation is such, that, if the said [*obligor*], his heirs, executors, or administrators, should within six calendar months next after the decease of the said Lord [——], well and truly pay, or cause to be paid, the sum of 16,500*l.*, of lawful British money, unto the said [*obligee*], his executors, administrators, or assigns; OR else, if the said [*obligor*] should, at any time or times hereafter, during the life of the said Lord [——], be minded and desirous to buy up and redeem the said expectant sum of 16,500*l.*, or any part or parts thereof; and should give —— days' notice in writing of such his intention unto the said [*obligee*] his executors, administrators, or assigns, or leave or cause to be left the same at his or their usual or last place of abode; and should, at the end of the —— days of which such notice shall be given, well and truly pay, or cause to be paid, unto the said [*obligee*], his executors, administrators, or assigns, such sum or sums of *money as the actuary for the time being of the Equitable Assurance Office, at Blackfriars Bridge, London, shall deem a fair and reasonable price or consideration for such

Condition, if obligor, his heirs, &c. should in six months after uncle's death, pay sum;

or if obligor should previously wish to redeem same, or any part thereof, and should give obligee notice thereof,

and should pay obligee such money as the actuary of the Equitable Assurance Office shall fix for a total or partial redemption;

(*c*) If the release bears date the same day as the bond, say,

RELEASE AND BOND OF EVEN DATE.

"bearing even date with the above-written bond, and executed immediately before the execution hereof released," &c. *ut supra.*

It is not requisite that the release should be dated the day before the bond, although it should be previously executed, because the release is the consideration for the bond.

POST OBIT CERTAIN, BUT REDEEMABLE.

total or partial redemption or redemptions, as the case shall be, regard being had to the respective ages of the said [*obligor*] and Lord [——] at the time or times of such redemption or redemptions respectively; AND ALSO, in the event of any such partial redemption or redemptions as aforesaid, if the said [*obligor*], his heirs, executors, or administrators, should, within six calendar months next after the decease of the said Lord [——], well and truly pay or cause to be paid unto the said [*obligee*], his executors, administrators, or assigns, so much of the said sum of 16,500*l.* as shall not have been redeemed or bought up in the life-time of the said Lord [——] as aforesaid: (*a*) *Then*, and in any of the before-mentioned cases, of full payment of the said sum of 16,500*l.* after the decease of the said Lord [——]; or of the redemption or buying up the whole of the same sum during his life; or of a partial redemption thereof during his life, and payment of the residue thereof after his death, in manner aforesaid (*b*), the before-written bond shall be void and of no effect; or else the same shall be and remain in full force and virtue.

and, in event of partial redemption, if obligor, his heirs, &c., should, in six months after uncle's death, pay so much of the sum as shall not have been redeemed;

then, in any case of full payment, or of redemption of whole, or of partial redemption, and payment of residue, bond to be void.

[(*a*) The following clause was added by Mr. Bythewood to his copy:

"And in case the said [*obligor*], his heirs, executors, or administrators, should not, within six calendar months next after the decease of the said Lord [——], well and truly pay or cause to be paid the said sum of 16,500*l.* unto the said [*obligee*], his executors, administrators, or assigns, then, and in such case, if he the said [*obligor*], his heirs, executors, or administrators, shall and will well and truly pay or cause to be paid unto the said [*obligee*], his executors, administrators, or assigns, interest, at and after the rate of five pounds *per centum per annum*, for the said sum of 16,500*l.*, or so much thereof as shall remain unpaid from the expiration of the said six calendar months up to and including the day of payment."]

[(*b*) "with interest as aforesaid, in the event hereinbefore mentioned."]

MEMORANDUM *of the Delivery of a* POST OBIT BOND *to a Depositary, to be kept sealed during the Life of the Obligor's Uncle, unless previously redeemed; in order that the Obligor's Expectations from his Uncle may not be prejudiced.*

MEMORANDUM OF DELIVERING POST OBIT BOND TO DEPOSITARY.

WHEREAS [*obligor*], of &c., by his bond or writing obligatory under his hand and seal, bearing even date with these presents, became bound to [*obligee*], of &c., in the sum of 30,000*l.*; and (*After reciting* that the said [*obligor*] was justly indebted, &c. *And also reciting* that &c. *(go on to the end of the recitals in the bond)*, *The* said bond or writing obligatory is *conditioned* to be void, if the said [*obligor*], his heirs, &c., should, &c. *(recite the bond, to the word Then.)* AND WHEREAS, in order to prevent the said recited bond from being disclosed or made public during the life of the said Lord [——], to the prejudice of the said [*obligor's*] expectations from him, it hath been agreed, that the same shall be sealed up in an envelope, and be delivered to [*depositary*], of &c., to be kept by him for the purposes, and under the restrictions herein-after expressed; and the same hath been accordingly done, as he doth hereby acknowledge. NOW THEREFORE the said [*obligor*] and [*obligee*] do hereby testify and declare, that the said in part recited bond, with the condition thereto, hath been so delivered to the said [*depositary*] as aforesaid, *Upon trust*, or to the intent that he, his executors or administrators, do and shall safely (*a*) keep and preserve the same so sealed up, as it hath been delivered to him as aforesaid, during the life of the said Lord

Recital of a bond, with recitals and condition.

Recital of agreement that bond shall be kept sealed by a depositary, in order that obligor's expectations from his uncle may not be prejudiced.

Declaration by obligor and obligee, that bond has been delivered to depositary, upon trust to keep it sealed up during uncle's life;

(*a*) *Vide ante*, Vol. 1, p. 2, n. (*b*). Just. Inst. 3. 15. 3. *De deposito*. D. 16. 3. 1. *Depositi vel contra*. 1 Strahan's Domat, 140, 144, edit. 1722. bk. 1, tit. 7, sec. 1 & 3; Wood's Civil Law, 209, 2d ed. bk. 1, ch. 2, sec. 3. *Depositum.*

MEMORANDUM OF DELIVERING POST OBIT BOND TO DEPOSITARY.

or if previously totally redeemed, to deliver bond to obligor to be cancelled. But if not totally redeemed at uncle's death, to deliver bond to obligee;

first indorsing partial redemptions.

Testimonium.

[——]; unless in the meantime the said [*obligor*] should buy up or redeem the said expectant sum thereby secured as aforesaid, pursuant to the power for that purpose given him by the said condition thereto; *And* in that case do and shall deliver up the said bond to the said [*obligor*], to be cancelled: *But*, in case the said expectant sum of 16,500*l.*, or any part thereof, should remain unredeemed, or not bought up, at the decease of the said Lord [——], then do and shall, upon such his decease, deliver the same bond to the said [*obligee*], his executors, administrators, or assigns, for his or their own benefit; but first indorsing thereupon, if a part or parts only of the said sum of 16,500*l.* should have been previously bought up as aforesaid, the sum or sums of money which shall have been so redeemed. WITNESS the hands (*b*) of the said [*obligor*], [*obligee*], and [*depositary*], this —— day of ——, 18—.

Stamp unnecessary.

(*b*) The above instrument does not appear to come within the words "Declaration of any use or trust, uses or trusts, of or concerning any estate or property, real or personal, where made by any writing not being a deed or will," 55 Geo. III. c. 184. Sched. Part. I., and not being under seal and delivered as a deed, a deed stamp is not requisite. *Vide ante*, Vol. 2, p. 588, n. (*d*); p. 401.

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TO SECURE SUMS TO BE ADVANCED IN ANSWERING DRAFTS, AND TO INDEMNIFY.

BOND *from Two Persons to London Bankers, to pay such Sums as the Bankers shall advance in answering Drafts or Bills to be drawn on them by a Mercantile Firm in the Country, not exceeding a certain Sum;* AND *to indemnify the Bankers from all Losses, &c., on account of accepting and paying such Drafts or Bills.*

Obligation from two to two, or more.

BOND jointly and severally from [*obligor*], of &c., and [*other obligor*], of &c., to [*obligees*], of &c.,

bankers and co-partners, carrying on business under the firm of "—— and Company," in the sum of —— pounds, *ut ante*, p. 179.

WHEREAS (*a*) the above-named [*obligees*] have, at the special instance and request of the above-bounden [*obligor*], opened an account with certain persons at the town and county of ——, using the firm or stile of —— and Company; and have agreed to accept the bills or drafts of the said —— and company, to be by them drawn upon the said [*obligees*] (*b*), for any sum or sums of money not exceeding in the whole, on the balance, from time to time, to become due from the said —— and company, on the accounts between them and the persons or person hereinafter mentioned, the sum of —— thousand pounds, upon the said [*obligor*], and the above bounden [*other obligor*], en-

Recital of having opened an account with a firm in the country;

and of agreement to accept bills to a certain amount, upon principal and surety giving bond.

(*a*) The condition of a bond being larger than the recital, the recital shall restrain it. *Vide post*, p. 235, n. (*a*). [Upon the principle that the general words in the operative part of a deed are controlled by a recital, it was lately held that where a general release of all debts, &c., contained a recital, that the releasee had previously *agreed* to pay to the releasor the sum of 40*l.*, and then in consideration of the sum of 40*l.*, "being now so paid as hereinbefore is mentioned," the receipt of which was thereby acknowledged, the releasor released, &c., and there was also a receipt indorsed; it was held that this did not estop the releasor from proving that no money was paid, as the general words of the release were qualified by the recital, which stated only an agreement to pay, and not actual payment. *Lampon* v. *Corke*, 5 Barn. & Ald. 606, *S. C.* 1 Dowl. & Ryl. 211; and see *Deardon* v. Lord *Byron*, 8 Pri. 417.]

Words in the operative part of a release, held to be controlled by the recital.

(*b*) The above form is adapted to the case where the surety intends that his guaranty should only extend to advances to be made by all the obligees. See *Strange* v. *Lee*, 3 East, 484; *post*, p. 239. But if it be intended that he should be a guarantee for advances to be made by the obligees as well as the survivors, and notwithstanding new partners, then add—

FOR ADVANCES AFTER CHANGE IN FIRM.

"or the survivors or survivor of them, and other the persons or person who shall or may become partners or partner with them, or any or either of them, in the banking business, or other the persons or person constituting the firm of the banking-house of the said [*obligees*] for the time being, for any sum," &c., *ut supra*.

TO SECURE SUMS TO BE ADVANCED IN ANSWERING DRAFTS AND TO INDEMNIFY.

tering into a bond, in the penalty above expressed, conditioned as hereinafter mentioned. AND WHEREAS the said [*other obligor*] hath agreed to join with the said [*obligor*] in such bond.

that one obligor hath agreed to join in bond. Condition for payment of sums to be advanced in paying drafts, and for which the merchant's house shall not remit effects; but not to exceed a certain amount.

NOW THEREFORE THE CONDITION of the above-written obligation is such, that, if the said [*obligor*] and [*other obligor*], or either of them, their, or either of their heirs, executors, or administrators, shall from time to time, and at all times hereafter, in case the said —— and company shall not remit to them the said [*obligees*] (*c*) effects in due time, sufficient to answer all the drafts and bills to be drawn upon them (*d*) by the said —— and company, not exceeding in the whole the sum of —— thousand pounds, upon request or demand to them, or either of them, made, well and truly pay, or cause to be paid, unto the said [*obligees*] (*e*), their executors, administrators, or assigns, all and every such sums or sum of money as shall happen to be advanced by them the said [*obligees*] (*f*), for the said —— and company, upon such drafts or bills as aforesaid, and for which no provision shall have been

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FOR ADVANCES AFTER CHANGE IN FIRM.

(*c*) "or the survivors or survivor of them, and other the persons or person who shall or may become partners or partner with them, or any or either of them, in the banking business, or other the persons or person constituting the firm of the said banking-house for the time being, effects," &c. *ut supra.*

(*d*) "or any or either of them, or other the firm aforesaid, by," &c. *ut supra.*

(*e*) "or the survivors or survivor of them, and other the persons or person who shall or may become partners or partner with them, or any or either of them, in the banking business, or other the firm of the said banking-house for the time being, and their, and each and every of their executors," &c. *ut supra.*

(*f*) "or the survivors or survivor of them, and other the persons or person who shall or may become partners or partner with them, or any or either of them, in the banking business, or other the firm of the said banking-house for the time being, for," &c. *ut supra.*

made by them the said —— and company, (if any such there should happen to be); AND ALSO if the said [*obligor*] and [*other obligor*], or either of them, their, or either of their heirs, executors, or administrators should, from time to time, and at all times hereafter, save, defend, keep harmless and indemnified, them the said [*obligees*] (*g*), their heirs, executors, and administrators, and every of them, their, and every of their, goods and chattels, lands and tenements, of, from, and against all losses, costs, charges, damages, and expenses which they the said [*obligees*] (*h*), their heirs, executors, or administrators, shall or may pay, bear, sustain, or be put unto, for or by reason, or on account of any drafts or bills to be by them accepted and paid for the said —— and company, not exceeding in the whole the sum of —— thousand pounds as aforesaid, *Then* the above-written obligation to be void; otherwise to be and remain in full force and virtue.

TO SECURE SUMS TO BE ADVANCED IN ANSWERING DRAFTS, AND TO INDEMNIFY.

and to indemnify the bankers from all losses, &c. on account of accepting and paying drafts.

(*g*) "and the survivors and survivor of them, and other the persons or person who shall or may become partners or partner with them, or any or either of them, in the banking business, or other the firm of the said banking house for the time being, and their, and each and every of their heirs, executors, and administrators, and their, and each and every of their goods," &c. *ut supra*.

FOR ADVANCES AFTER CHANGE IN FIRM.

(*h*) "or the survivors or survivor of them, and other the persons or person who shall or may become partners or partner with them, or any or either of them, in the banking business, or other the firm of the said banking-house for the time being, or their, any or either of their heirs," &c.

BY SURETIES, TO PAY SUMS ALREADY OR TO BE ADVANCED.

BOND *from Two Sureties to London Bankers, for Payment of such Sums already, or to be hereafter, advanced to Co-partners, with Interest, as the Co-partners shall not pay: but the Sureties to be only liable to a certain Amount.*

Obligation from two to two, or more.

BOND jointly and severally from [*two obligors*], of &c. to [*obligees*], of &c., in the sum of —— thousand pounds, *ut ante*, p. 179.

Recital of obligees having, at obligor's re-

WHEREAS (*a*) the above-named [*obligees*] have, at the special instance and request of the above-bound [*obligors*],

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The condition of a bond being larger than the recital, the recital shall restrain it.

(*a*) The condition of a bond being larger than the recital, the recital shall restrain it. Thus, where in the condition of an obligation, it was recited, that a sheriff had appointed the defendant bailiff of a hundred within his county, "If therefore the defendant shall duly execute all warrants to him directed, that then" &c., it was adjudged, that the words "all warrants" should be intended to be only all warrants which were directed to the defendant *as bailiff of the said hundred*, and not other warrants. *Horton* v. *Day*, cited 2 Saund. 414; *S. C.* Sty. 18; All. 10. So, where, in debt on bond, against a surety, the condition was in these words: "The condition of this obligation is such, that whereas the above-named Henry, Lord Arlington, postmaster-general to the King's most excellent Majesty, by his sufficient instrument or writing, under his hand and seal, bearing date the thirtieth day of April, 1667, hath deputed the above-bound Thomas Jenkins to be his deputy post-master of the stage of Oxon, in the county of Oxon, above said, to execute the said office from the twenty-fourth day of June next coming, *for the term of six months following;* Now, if the said Thomas Jenkins, his deputies, servants, and assigns, do and shall, for and during *all the time* that he the said Thomas Jenkins shall continue deputy post-master of the said stage, well, truly," &c. It was argued, that the defendant, by the intention of the condition, was not to be responsible for Jenkins for any longer time than for the six months, although the words are, that Jenkins, during "all the time that he shall continue deputy-postmaster," &c. *indefinitely*, "shall observe and perform," &c. Yet this time, which is

advanced and paid to and to the use of [*partners*], of &c., merchants and co-partners, divers sums of money, by payment of bills of exchange or otherwise; and they the said [*obligees*] have agreed, during their pleasure, at the like request of the said [*obligors*], to pay or advance other monies to, or to the use of the said [*partners*], by payment of such drafts or bills, or otherwise. And whereas the said [*obligors*], in order to induce the said [*obligees*] to comply with the above-mentioned requests, agreed to

quest, paid money for the benefit of co-partners: and during pleasure at like request to pay other monies:

and that, as an inducement thereto, obligors have agreed to execute bond.

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indefinite in itself, ought to be construed only for the six months for which the condition recites that Jenkins was appointed to be deputy post-master, and to which the condition relates: and the rather because Jenkins cannot continue deputy postmaster for any longer time than for the six months, unless he be appointed anew, and have a new deputation for a longer time: and that by the construction which the plaintiff's counsel would put upon it, the defendant would be tricked; for it appears that the defendant intended to be bound for Jenkins for the due execution of the office only for six months; but the plaintiff would have the defendant bound during the whole life of Jenkins, which is unreasonable to suppose; and therefore, that the breach ought to have been assigned for non-payment of the monies received within the six months; and it not being so assigned, that the replication was bad and insufficient. And, for the reasons urged by the defendant's counsel, the Court held, that the condition shall refer to the recital only, by which the defendant was bound only for six months, and not longer; for the words, "during all the time," shall be intended, but only during the six months recited in the condition. Lord *Arlington* v. *Merricke*, 2 Saund. 411.

In general, bonds of suretyship and indemnity do not remain in force after a change has taken place in the firm.

The last-cited case has been considered as a leading authority upon this subject ever since. As, where, in debt on bond, conditioned that one W. B. should, during the time he should continue in the service of the plaintiff as a broad-clerk, keep just and true accounts of all monies received and paid, and from time to time pay all monies which he should receive belonging to the plaintiff, into his hands; the defendant pleaded that the plaintiff, at the time the bond was given, carried on the trade of a brewer in his own name only, and the service in the condition mentioned was intended to be executed by the said W. B. to the plaintiff in his trade so carried on by him on his own account only; and that the plaintiff some time after entered into partnership with another, and that during all the time that the said W. B. continued in the service of the plaintiff alone, he performed the condition of the said bond: the plaintiff replied, that the said W. B. was continued to be broad-clerk after the plaintiff had taken a partner, and that the said W. B. afterwards received 147*l.* 13*s.* on account

BY SURETIES TO PAY SUMS ALREADY OR TO BE ADVANCED.

execute such bond or obligation as is above written, with such condition as is hereinafter expressed and contained.

Condition, that if partners do not pay sums already, or to be hereafter advanced to them, with interest, then obligors to pay same.

NOW THEREFORE THE CONDITION of the above-written obligation is such, that, if the said [*partners*], some or one of them, their, some, or one of their respective executors or administrators, should not, from time to time, and at all times hereafter, on demand, well and truly pay, or cause to be paid unto the said [*obligees*], their exe-

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of the plaintiff and his partner, which sum he had not paid: but on demurrer the Court, on the authority of Lord *Arlington* v. *Merricke*, and of *Horton* v. *Day*, held, that the defendant, who was a surety only, ought not to be bound beyond the scope of his engagement, which was to be answerable for the fidelity of the said W. B. to the plaintiff only; and therefore, when he took in a partner, there was an end of the obligation; for, as the condition was confined to the plaintiff only, and the breach assigned was for non-payment of the money to the plaintiff and his partner, it was not within the condition; and gave judgment for the defendant. *Wright* v. *Russell*, 3 Wils. 530, 2 Wm. Bla. 934, *S. C.* So, where in debt on bond, conditioned, reciting that the defendant was the plaintiff's receiver at Bristol, if, therefore, he did well and truly account for all sums by him received, then the bond to be void; the breach was, that he received so much money and did not account for it; and because it appeared by the recital in the condition, to be only about transactions of a particular nature, the general assignment of the breach was held ill, on the authority of Lord *Arlington* v. *Merricke*. *African Company* v. *Mason*, cited in *Stibbs* v. *Clough*, 1 Str. 227. So, where in debt on bond, conditioned that one H. (whom the bond recited the obligee had taken as clerk to him the said obligee) should give a true and just account of, and pay unto the obligee, his executors and administrators, all money which the said H. should from time to time receive for and on account of the said obligee, his executors or administrators; the defendant pleaded performance; the plaintiff replied that the obligee died, and appointed the plaintiffs his executors, who carried on the trade of the obligee after his death; and that the said H. upon the death of the obligee, continued in the service of the plaintiffs as their clerk, and that whilst the said H. continued in their service, he received the sum of 502*l.* belonging to the plaintiffs as executors, which he had not paid. It was adjudged, that the defendant was not liable; for the bond was given to the obligee as an indemnity that the clerk should be faithful to him, and should pay all the money received on his account to him, or to his executors; and it was not the intention of the parties that the bond should be extended beyond the obligee's life; and it was said to be just like the case of Lord

Surety for the fidelity of a servant to a sole trader, does not extend to a subsequent partnership.

cutors, administrators, or assigns, all and every such sum or sums of money as already have been, or hereafter shall or may be, paid or advanced by them the said [*obligees*], to or to the use of the said [*partners*], with lawful interest for the same, from the time or respective times of such advancement thereof, and also commission and all other customary charges, *Then*, if the said [*obligors*], or either of them, their, or either of their heirs, executors, or administrators, should well and truly pay, or cause to be paid,

BY SURETIES TO PAY SUMS ALREADY OR TO BE ADVANCED.

Arlington v. *Merricke*. *Barker* v. *Parker*, 1 Durnf. & East, 287. But where the security is given to the house, as a banking-house for instance, for the fidelity of a clerk *in the shop and counting-house*, and not to particular persons, a change of partners is held to make no difference, but the surety still continues liable. As, where the condition of a bond, reciting that the plaintiffs had agreed to take one P. J. into their service and employ as a clerk in their shop and counting-house, and the obligees had agreed to become security for his fidelity as far as 500*l*. each, declared, that, if the said P. J. should faithfully account for and pay to the plaintiffs all sums of money he should at any time receive in the service of the plaintiffs, then the bond to be void. In an action upon this bond, a verdict was found for the plaintiffs, upon a case, which stated, that, after the bond was given, one R. S. was taken into partnership with the plaintiff, and that afterwards the said P. J. received a sum of money on account of the new partnership, and had not paid over to the plaintiffs. The Court thought this case materially distinguishable from the above cited of *Wright* v. *Russell;* for, in this case, the security was to the house of the plaintiffs, but in that it is only to Wright personally, and the breach assigned was for embezzling the whole partnership money. *Barclay* v. *Lucas*, 1 Durnf. & East, 291, note (*a*). But the authority of *Barclay* v. *Lucas*, has been considerably shaken, if not overturned; and the Courts have appeared disposed to return to the principles on which *Wright* v. *Russell* was decided, and to hold contracts to be, not with *a house* in trade, but with the individuals carrying it on. Watson on Partnership, 119, 2d ed. Thus in *Myers* v. *Edge*, 7 Durnf. & East, 254, it was decided, that a promise in writing, directed to three partners, to pay for goods to be furnished to another cannot be enforced in an action by two of them, to recover the value of goods furnished after the third had withdrawn from the partnership †. So, where a bond was given by A., reciting that B. intended to open a

But where the security is for the fidelity of a clerk in the shop and counting-house, and not to particular persons, a change of partners has been held to make no difference: *sed quære.*

Promise to three partners to pay for goods to be furnished to a third person, does not extend to goods furnished by two of them, when one has withdrawn from the partnership

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[† An action of *assumpsit* may be maintained by the several partners of a firm upon a guaranty given to one of them, if there be evidence that it was given for the benefit of all. *Garret* v. *Handley*, 4 B. & C. 664; *S. C.* 7 D. & R. 144.]

BY SURETIES, TO PAY SUMS ALREADY OR TO BE ADVANCED.

unto them the said [*obligees*], their executors, administrators, or assigns, such sum and sums of money, and inter-

Bond for payment to three bankers, partners, of money advanced to a third person, does not cover advances after the death of one partner.

banking account with C., D., and E., as his bankers, the condition of which bond was for payment to them of all sums from time to time advanced to B. at the banking-house of C., D., and E.: it was holden, that on C.'s death such obligation ceased, and did not cover future advances made after another partner was taken in; and that B., who was indebted to the house at C.'s death, having afterwards paid off the balance, which was applied at the time to the payment of the old debt incurred in C.'s life-time, A. was wholly discharged from the obligation: and the Court thought this question concluded by the cases of *Arlington* v. *Merricke*, *Wright* v. *Russell*, and *Barker* v. *Parker*. *Strange* v. *Lee*, 3 East, 484. So, where the condition of a bond, reciting that the defendant had agreed with the plaintiffs to collect their revenues from time to time for twelve months, was, that at all times thereafter during the continuance of such his employment, and for so long as he should continue to be employed, he would justly account and obey orders, &c.; it was held, that the obligation was confined to the period of twelve months mentioned in the recital: and Lord *Arlington* v. *Merricke* was relied upon and recognized as a case expressly in point. *Liverpool Water-works' Company* v. *Atkinson*, 6 East, 507, [2 Smith, 654, *S. C.*]; Wms. n. 2 Saund. 414 *a* (5). So the extent of the condition of an indemnity bond may be restrained by the recitals, though the words of the condition import a larger liability than the recitals contemplate. *Pearsall* v. *Summersett*, 4 Taunt. 593.

The condition of an indemnity bond may be restrained by the recitals.

Notwithstanding that the bond is given to cover advances made by them, "*any or either of them.*"

[So, where A. and B., as principals, and C. and D., as sureties, executed a bond to five bankers, with a condition, reciting that all the obligors had applied to the five obligees and requested them, in their capacity of bankers, to advance monies, &c., for A. and B., not exceeding in the whole, at any period, 3,000*l.*, which the said obligees had consented to do upon being indemnified against loss; therefore, if the obligors should, upon request, pay to the five obligees, their executors, administrators, or assigns, all such sum and sums of money, as at any time thereafter should be paid or advanced by the five obligees, *or any or either of them*, unto or for the use of A. and B., or which would become due unto the five obligees from A. and B., upon any bills, &c., paid by them into the hands of, or accepted by the five obligees, on account of A. and B, as their bankers, and the charges thereon; and also if the obligors, or either of them, should keep indemnified the five obligees, and each of them, their and each of their heirs, &c., against all loss by reason of their transactions, as bankers for A. and B., then the bond to be void. One of the five obligees died, and an action being brought by the survivors upon the bond, it was objected, upon the principle of the preceding cases, that the defendants were not liable for advances made after the death of the deceased partner, and the Court was

est as aforesaid, *Then* the above-written bond or obligation shall be void and of no effect, but otherwise shall be and remain in full force and virtue.

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of opinion that the case fell within this principle, for, that the words, "advanced by them, or *any or either of them*," occurring in the condition of the bond, must be confined to money advanced by any or either of the obligees in their capacity of bankers, *on behalf of all the five*, and not as extending to advances made by the surviving partners. *Weston* v. *Barton*, 4 Taunt. 673.

Bond to secure advances to two persons not extended to advances to the survivor.

[Again, where A. and B., bankers of S., executed a joint and several bond to C., D., and E., bankers of London, in the penal sum of 5,000*l.*, with a condition, which, after reciting, that A. and B. had applied to C., D., and E., to permit them to draw bills on C., D., and E., for their acceptance and payment, they, the said A. and B., engaging to pay or remit to the said C., D., and E., the amount of such bills, proceeded thus: "The above-written obligation is such, that if A. and B. shall remit to C., D., and E., the amount of all such sums as they, the said A. and B., *or either of them*, or any other person authorized by them, or either of them, shall draw on C., D., and E., then and in such case," the obligation to be void. Several years after the execution of the bond, A. died, at which time a large balance was due from A. and B. to C., D., and E., who continued the account with the bank at S., which was carried on by B., no balance being struck, or any rest or alteration made in the account. In the course of these transactions, B. paid to the London bankers a sum exceeding the amount due at the death of A.; but a sum exceeding the amount of the penalty of the bond was now due. In an action brought by C., D., and E., against B. and the executors of A., it was held that the bond did not extend to sums advanced to the surviving obligor, and that the sums remitted by him on a general account, subsequently to the death of A., were to be applied in liquidation of the portion of the debt which had been the longest due, and therefore the debt owing from the partnership at the death of A., was extinguished, and no claim could be supported against his representatives upon the bond. *Simson* v. *Cooke*, 8 J. B. Moore, 588; *S. C.* 1 Bing. 452.]

Surviving partners, having subsequently received payments more than sufficient to discharge a debt due on bond at the death of deceased partner, held that the bond was satisfied.

A bond was given to the several persons constituting the firm of a banking house, conditioned for the repayment of the balance of an account, and of such further sums as the bankers might advance to the obligor; one of the partners dies, and a new partner is taken into the firm: at that time a considerable balance is due from the obligor to the firm; advances are afterwards made by the bankers, and payments made to them on account by the obligor; the latter is credited by the new firm with the several payments, and charged with the original debt, and subsequent advances, as constituting items in one entire ac-

Proviso that obligors shall only be liable to a certain amount.

PROVIDED *nevertheless*, that the said [*obligors*], or either of them, their, or either of their heirs, executors, or

count, and the balance due at the time of the partner's death is considerably reduced, and that reduced balance, by order of the obligor, is transferred by the bankers to the account of another customer, who, with his assent, is charged with the then debt of the obligor. The person so charged having become insolvent, the surviving partners of the original firm brought their action upon the bond: Held, that, as they had not originally treated it as a distinct account, but had blended it in the general account with other transactions, they were not at liberty so to treat it at a subsequent period; and that, having received at different payments a sum more than sufficient to discharge the debt due upon the bond at the time of the death of the deceased partner, the bond was to be considered as paid. *Bodenham* v. *Purchas*, 2 Barnw. & Ald. 39. In which case there is a *quære*, whether the transfer of the balance due from the obligor to the account of another, with his assent, did not, in point of law, operate as a payment. The decision in the last cited case was principally founded on *Clayton's* case, in *Devaynes* v. *Noble*, 1 Meriv. 585, 604, where Sir William Grant determined, that creditors who, after D.'s death, continued to deal with the surviving partners, by drawing out and paying in; but, having drawn sums out before they paid any in, the balance varying from time to time, but being, upon the whole, *increased* by such subsequent dealings;—the subsequent payments by the surviving partners must be taken in reduction of the balance due at D.'s death; and his estate held discharged *pro tanto*.

The condition may be extended to advances by future partners.

But a bond may be drawn with a condition for the obligor to be answerable not only to the present, but to all future partners in the house. *Strange* v. *Lee*, 3 East, 491.

Bond by a surety for advances to a definite amount is not a continuing guaranty after advances to that amount are made.

If a bond be given by a surety as an indemnity for advances to a definite amount, when advances are made to that amount, the guaranty becomes *functus officio*, and is not a continuing guaranty. Thus, a bond entered into by A. and B. to the plaintiffs, to enable A. to carry on his trade, conditioned for the payment of all such sums, not exceeding 3,000*l.*, which should at any time thereafter be advanced by the plaintiffs to A., is not a continuing guaranty to the extent of 3,000*l.* for advances made at any time, but only a guaranty for advances once made to the extent of 3,000*l.* Payments made generally to the plaintiffs on the account of A. may be applied by them in liquidation of a balance existing against A. before the execution of the bond, and B. cannot insist upon their being applied in exoneration of his liability on the bond, although, at the time of his entering into it, the plaintiffs did not give him notice that any balance was then existing against A. *Kirby*

administrators, shall not be liable to answer or pay more than —— thousand pounds of lawful money of Great Britain, upon or by reason or means of the above-written obligation.

BY SURETIES, TO PAY SUMS ALREADY OR TO BE ADVANCED.

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v. Duke of *Marlborough*, 2 Maule & Selw. 18. [But where a warrant of attorney was given with the following defeazance: "The within warrant of attorney is given to secure the sum of 4,000*l.*, with lawful interest thereon," it was held that it was to be construed as a continuing security, and not merely as applicable to the debt existing at the time, and therefore was not satisfied by the payment of a larger sum by the debtor, on a general account. *Woolley* v. *Jennings*, 5 Barn. & Cress. 165.

Effect of acquiescence of surety.

[If the surety in a bond concurs in an arrangement on the settlement of accounts between the creditor and the principal, by which a security, to which he is a party, is considered as remaining unsatisfied, (certain sums paid by the principal being applied in satisfaction of another debt), he cannot afterwards claim to have those monies applied in liquidation of the debt secured by him: and it should seem that his acquiescence would be presumed, if he can be proved to have known of such an arrangement, without protesting against it.

[Thus, where A. and B. entered into a joint and several bond for securing a sum of money advanced to A. by his bankers, for a particular purpose; A. had at that time an open account with the bankers, which was in his favour. After the execution of the bond, and before it became due, A. paid money to the bankers, and he continued to draw upon them until his banking-account, which was overdrawn, was closed. Some years afterwards, a settlement of accounts took place between A. and the bankers, in which the whole money secured by the bond was treated as remaining due from A. The bankers then agreeing to allow A. time, took a warrant of attorney from him for the amount of their whole debt, payable, by instalments, at distant periods. Before all the instalments were paid, A. became bankrupt. It being proved that B. was privy to the settlement of accounts between A. and the bankers, and to the arrangement respecting the warrant of attorney; it was held, first, that B. was not discharged by the time given to A., and secondly, that the bond debt was not liquidated by the sums from time to time paid by A. to the bankers, such sums being, by the arrangement made by A. with the bankers, in which B. was to be considered as concurring, applied to the banking-account; and the bankers were therefore entitled to hold the bond and warrant of attorney, as distinct securities. *Tyson* v. *Cox*, 1 Turn. 395.]

SURETIES FOR TRADESMAN TO A GIVEN AMOUNT.

BOND *from Two* **Sureties** *to Merchants, who have agreed to supply a Tradesman with Goods, conditioned to be void on Payment by Principal; or, in case of his Default, on Payment by Sureties, Six Months after Notice, of such Sums not exceeding* 1,000*l.* *as shall be due; but, if exceeding* 1,000*l.*, *or if no such Notice shall be given, then that Sum.*

Obligation from two to five.

BOND from [*two sureties*] (*a*), of &c., jointly and severally, to [*five obligees*], of &c., in the sum of 1,000*l.*, *ut ante*, p. 179.

Recital of agreement to supply a tradesman with goods on sureties giving bond.

WHEREAS [*principal*], of &c., intends to carry on the *trade or business of ——, at —— aforesaid; and hath applied to and requested the above-named [*obligees*] to supply him with goods in the way of his trade; which they have agreed to do, upon the said [*two sureties*] entering into a bond in the penalty above mentioned, and as hereinafter is expressed.

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Condition making bond void on payment by principal;

NOW THE CONDITION of the above-written bond or obligation is such, that, if he the said [*principal*], his heirs, executors, or administrators, or some or one of them, should, from time to time, and at all times hereafter, well and truly pay, or cause to be paid unto the said [*obligees*], their executors, administrators, or assigns, all and every such sum and sums of money as shall at any time or times hereafter become due and owing to them the said [*obligees*] (*b*), from the said [*principal*], for goods which shall or may at any time or times hereafter be sold by them (*b*) to the said [*principal*], and sent and delivered to, or to the

(*a*) See covenant not to resort to surety until default by principal, *post*, title Covenant, Vol. 4, p. 23.

EXTENDED TO NEW FIRM.

(*b*) If it be intended to extend the security to sums to become due after an alteration in the firm, *vide ante*, p. 232, *post*, pp. 446, 461.

order of the said [*principal*], as such sum or sums shall respectively become due and payable; Or in case the said [*principal*], his heirs, executors, or administrators, should, at any time or times hereafter, make default in the payment of any such sum or sums, and the said [*two sureties*], or one of them, their, or one of their heirs, executors, or administrators should, within the space of six calendar months next after notice of any such default, and of the sum then due, shall be given to, or be left at the respective dwellings of them the said [*two sureties*], or of their respective heirs, executors, or administrators, by them the said [*obligees*], or any of them, their, or any of their executors, or administrators, well and truly pay, or cause to be paid unto the said [*obligees*], their executors, administrators, or assigns, all and every such sum and sums of money as at the time of such notice shall be due and owing from the said [*principal*], his heirs, executors, or administrators, unto the said [*obligees*], their executors, administrators, or assigns, in case the same should not exceed *the sum of one thousand pounds sterling; *but* if the same should exceed the sum of one thousand pounds sterling, then the sum of one thousand pounds, in part of such sum or sums then due and owing, as last aforesaid; Or if no such notice as aforesaid should be given or left as aforesaid, *Then*, in any of the said cases, the above-written bond or obligation shall be void, and of no effect; otherwise shall be and remain in full force and virtue.

SURETIES FOR TRADESMAN TO A GIVEN AMOUNT.

or in case of his default, on payment by sureties, six months after notice, of such sums, not exceeding 1,000*l.* as shall be due; but if exceeding 1,000*l.* then that sum;

or if no such notice shall be given.

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ATTORNEY AND SURETIES TO LONDON AGENT.

BOND *from an* ATTORNEY *in the Country, and* TWO SURETIES, *to his* AGENT *in London, for securing Money due, and to become due, on account.*

BOND from [*principal*] of &c., [*surety*], of &c., and [*other surety*], of &c., to [*agent*], of &c., in the penalty of 10,000*l.*, *ut ante*, p. 179.

WHEREAS the above-named [*obligee*] hath for some time past acted as the agent in London of the above-bounden [*principal*], in his business of an attorney and solicitor: *And* the said [*principal*] is now indebted to the said [*obligee*] in a considerable sum of money on such account: *And* the said [*principal*] hath applied to the said [*obligee*] to continue to act as such agent, which he the said [*obligee*] hath consented and agreed to do upon having a bond from the said [*principal*], with sufficient sureties, for the re-payment of the money already due, and which may hereafter become due, from the said [*principal*] to the said [*obligee*] (*a*). AND WHEREAS the above-
[*214] *bounden [*surety*] and [*other surety*] have, on the application of the said [*principal*], agreed to enter into the above-written bond or obligation as such sureties.

TO A LIMITED EXTENT.

(*a*) If limited not to exceed a given sum, add,
" as hereinafter mentioned."

Stamp.

For, if the total amount of the money secured, or to be ultimately recoverable thereupon, shall be uncertain, and without any limit, the stamp must be 25*l.* But, where limited not to exceed a given sum, the same duty as on a bond for such limited sum. 55 Geo. III. c. 184, Sched. Part 1, title BOND.

Where the sum to be secured is unlimited, it seems the penalty is the limit as to the stamp duty.

But it seems clear, that, in the absence of an express limitation, the penalty is the limit; and therefore, in such a case, the duty should be paid on the penalty. *Vide ante*, p. 199, 200. In that point of view, it may appear unnecessary to limit the amount expressly.

ATTORNEY AND SURETIES TO LONDON AGENT.

NOW THE CONDITION of the above-written bond or obligation is such, that, if the above-bounden [*principal and sureties*], their heirs, executors, or administrators, or some or one of them, should, from time to time, and at all times hereafter, well and truly pay or cause to be paid unto the said [*obligee*], his executors, administrators, or assigns, all such sum and sums of money as are now due and owing from the said [*principal*] to the said [*obligee*], as such agent as aforesaid; *And also* all such further sum and sums of money as may at any time or times hereafter become due from the said [*principal*] to the said [*obligee*], as such agent as aforesaid, when and so often as they the said [*principal and sureties*], or any of them, their, or any of their heirs, executors, or administrators, shall be required so to do by the said [*obligees*], his executors, administrators, or assigns; *Then* the above-written bond or obligation shall be void and of no effect; otherwise shall be and remain in full force and virtue (*b*).

LIMITED EXTENT.

[(*b*) If it be the intention, limit the extent, *ut ante*, p. 240, or thus, "PROVIDED ALWAYS, and it is hereby declared, that the whole amount of monies to be ultimately recoverable by virtue of these presents shall not exceed the sum of —— pounds." *Note by Mr. B.*]

TO TRANSFER STOCK AFTER NOTICE, AND PAY DIVIDENDS IN MEAN TIME.

BOND *for Purchasing and Transferring* (*a*) *Navy Five per Cent. Bank Annuities, after Six Months' Notice, being the Amount of Stock sold for the Obligor's Benefit; and for Paying the Amount of the Dividends in the mean time.*

Obligation from one to one.

BOND from [*obligor*], of &c., to [*obligee*], of &c., in the sum of 2,000*l.*, *ut ante*, p. 179.

Condition for purchasing and transferring

THE CONDITION of the above-written bond or obligation is such, that, if the above-bounden [*obligor*], his

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(*a*) ON THE LOAN, AND AGREEMENT TO RE-TRANSFER STOCK, AND TO PURCHASE AND TRANSFER STOCK, AT A FUTURE DAY.

I. *As connected with the Law relating to* Usury.

II. *As connected with the* Stock-jobbing Act.

1*st. That part of the act relative to contracts for transferring stock of which the party is not possessed.*

2*nd. That part of the act relative to paying differences.*

III. *As to the measure of* damages, *in case the stock be not transferred on the day appointed, and the lender has recourse to an action at law, or suit in equity.*

IV. *As to proof of a debt for not transferring stock, in case the borrower becomes* bankrupt.

I. The temporary transfer of stock in the public funds is an engine of usury not unfrequently resorted to.

The mere loan of stock is not usurious, nor the payment of the dividends in the mean time, even though they exceed the legal rate of interest.

The cases on this point are not in perfect harmony. However, it seems agreed, that the mere loan of stock is not usurious, nor the payment of the dividends in the mean time, even though they exceed the legal rate of interest; *Per* Lord *Kenyon*, in *Tate* v. *Wellings*, 3 Durnf. & East, 547; but that usury can only attach to the proceeding, where the party *transferring* receives, or is likely to receive, more than the legal rate, and cannot by possibility receive less. Comyn on Usury, 104.

The earliest case on the subject is *Moore* v. *Battie*, Amb. 371; *S. C.* 1 Eden, 273; where the defendant, Dr. Battie, lent the plaintiff several sums of money upon mortgage; and the plaintiff, having occasion for more, the defendaut advanced him 1,000*l.* in the following manner: by

heirs, executors, or administrators, or any of them, should, (*b*) at any time within six calendar months after notice in writing for that purpose from the above-named [*obligee*],

Navy five *per cent.* Bank Annuities, after six months' notice.

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selling out 1,000*l.* South-Sea Annuities, which, at that time, were under par, and sold at a loss of 76*l.* upon the whole, and paying him 924*l.* the money for which they sold, took a mortgage for the whole 1,000*l.* at 5*l. per cent.* interest, with covenant to reduce the interest to 4*l. per cent.* if paid within one year. He afterwards advanced the plaintiff 1,400*l.* more in the same manner, by sale of so much South-Sea Annuities, which were then also under par, and being sold at the loss of 267*l.* 15*s.* upon the whole. The sum paid to the plaintiff was 1,132*l.* 5*s.* The mortgage was for 1,400*l.* at 5*l. per cent.* interest, with a power for Moore to reinstate the 1,400*l.* South-Sea Annuities at any time within two years, which was not done. A bill was brought by the defendant to foreclose; and Moore, in his answer, admitted the mortgages, and submitted in general to pay what was due. The Master, in taking the account, considered those sums as 1,000*l.* and 1,400*l.*, and computed interest upon them accordingly. The plaintiff paid the principal, interest, and costs, and then brought this bill, *inter alia*, to be paid the several sums of 76*l.* and 267*l.* 15*s.*, and interest; insisting that he ought not to have been charged with them in the account. The defendant pleaded the proceedings under the decree, in bar; and two questions being raised: first, whether the transaction was usurious? and secondly, whether, the money having been paid, equity would relieve? Sir *Robert Henley*, Lord Keeper, said, "As to the first, I am clear of opinion it is a shift within the statute of usury. The plaintiff had but 924*l.* instead of 1,000*l.* in the one case, and 1,132*l.* 5*s.* instead of 1,400*l.* in the other. He has paid as much interest as is equal to 5*l. per cent.* for 1,000*l.* and 1,400*l.*, which is more than the statute allows, being more than 5*l. per cent.* for the money he received. Suppose stocks at 75*l. per*

(*b*) If the stock is to be replaced on a certain day, say, "on or before the —— day of —— now next, purchase and transfer," &c. *ut supra.*

ON A CERTAIN DAY.

If the stock is to be replaced on a certain day, and default is made, the obligee may recover the value of the stock on the day appointed for replacing it, or on the day of trial, at his option. *Vide post*, p. 259. And if default is made in paying the dividends, or replacing the stock, the value of the stock may be proved under the commission, if the borrower becomes bankrupt. But, if the stock is to be replaced after notice, and the obligor becomes bankrupt before notice, without having failed in paying the dividends, the value of the stock cannot be proved under the commission. *Vide post*, p. 261, 262; and Mr. Shadwell's opinion, *post*, p. 271.

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his executors, administrators, or assigns, to be delivered to the said [*obligor*], his heirs, executors, administrators, or assigns, or to be delivered and left for him or them at

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cent.; if a person takes at par, he pays 6*l.* 5*s. per cent.* The case of the 1,400*l.* is not distinguishable from the other. Not so on the footing of a risk; for the defendant took interest for 1,400*l.*, though, in fact, the plaintiff received but 1,132*l.* 5*s.* As to the second point, equity will relieve after the money is paid; the law cannot. This matter was not in question in the former cause. The plaintiff might indeed have brought a cross bill, but he did not; there has, therefore, been no determination on this question. He complains of being injured in the account." His Lordship, therefore, decreed payment. In confirmation of the second point, see *Bosanquet* v. *Dashwood*, Cases temp. Talb. 38; *Proof* v. *Hines*, Ibid. 114; *Barker* v. *Vansommer*, 1 Bro. C. C. 149; *Brown* v. *Barkham*, 1 P. Wms. 652.

Where illegal interest has been actually paid, equity will, on the prayer of the oppressed party, order repayment.

But as to the first point of the above case, independently of any consideration of the power which was given to the borrower of replacing the stock, and so of defeating the excess of interest, it appears that the lender was *subject to some loss*, whether the stock were replaced within two years or not. For, if the stocks fell within two years, it might have been replaced for less money than it had been sold for; if they rose after the two years had expired, the money paid to him would not have enabled him to purchase as much stock as he originally had.

If this be so, it will be difficult to reconcile this case with the cases of *Tate* v. *Wellings*, and *Pike* v. *Ledwell*, which have subsequently been decided.

It has been held, that the lender may stipulate for the re-transfer of stock at a given day, and in default of transfer, then for payment of the money produced by the sale, and reserve a rate of interest equal to the dividends.

The first of these was an action on a bond, in the penalty of 1,550*l.* 6*s.* to which the defendant pleaded usury. And it appeared in the evidence, that the defendant had applied to Wellings (to whom the plaintiff was executor), to advance him a sum of money; which the testator consented to do, upon the defendant's promising to him the same interest that he received in the short annuities, viz. eight and a half *per cent.*; it was therefore settled that the money should be raised by the sale of short annuities, to the amount of 912*l.* 12*s.* 6*d.*, which the defendant was to replace in the same stock by the 1st of September, 1785; but if it were not replaced by that time, he was then to repay the 912*l.* 12*s.* 6*d.* on the 1st of January, 1786, and in the mean time to pay such interest as the stock would have produced. There was no actual transfer of the short annuities to the defendant himself; but the stock was really sold to some other person, and the defendant received the produce of it the same day. Lord *Kenyon* left it to the jury to consider whether this was intended as a *bonâ fide* loan of stock, or as a loan of money, and the present device a mere colour for receiving more than legal interest: they found that it was a fair and

——, purchase and transfer, or cause to be purchased and transferred, unto and into the name or names of the said [*obligee*], his executors, administrators, or assigns,

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honest loan of stock, and gave the plaintiff a verdict. A rule for a new trial was obtained. Upon shewing cause against which, it was urged, that the defendant, having it in his power to replace the stock any time before September, 1785, during which interval the testator ran the risk of the stocks falling, and the defendant's replacing it upon such a fall; and that the testator was only to receive what he would have received in case he had not sold his stock. In support of the rule, it was contended, that though a contract for the loan of stock, to be replaced in stock at all events, be legal, yet, as there was an alternative to replace it on a given day, or to repay it in money, with more than lawful interest, it was usury. The Court, however, thought otherwise: and, as the jury had negatived the colour for usury, they thought themselves bound to consider it a fair transaction, and accordingly discharged the rule. *Tate* v. *Wellings*, 3 Durnf. & East, 531. Lord *Kenyon* thought, that, as the transaction was legal during the first year, there was nothing superadded to make it usurious. Mr. Justice *Ashhurst* thought, that from the contract the creditor derived no advantage, for he was only to receive in the mean time the same interest which the stock would have produced: and Mr. Justice *Buller* said, this was not like the case cited from Cro. Jac. [507, *Roberts* v. *Trenayne*], where the principal was always secure; for here the testator might have been a loser in the event of the stock rising after the first year. Mr. *Coote* says "on consideration of the foregoing case, it is respectfully submitted, that the opinion given by Lord *Kenyon*, viz. that there was nothing superadded after the first year to make the transaction usurious, appears singular, considering that it was an agreement to repay *a sum of money* with eight and a half *per cent.* interest. The reason given by Mr. Justice *Ashhurst* is yet more remarkable; for it would seem to imply, that an agreement to repay money raised by the sale of stock, would not be usurious, if the rate of interest did not exceed the dividends of the stock sold. The reasoning of Mr. Justice *Buller*, namely, that the lender ran the hazard that the stock might rise after the first year, would apparently apply to any loan of money raised by the sale of stock. The lender cannot be advised to rely on the case of *Tate* v. *Wellings* as an authority for the proposition, that he may stipulate for the re-transfer of stock at a given day, and in default of transfer, then for the payment of the amount of the money produced by the sale, and reserve a rate of interest equal to the dividends." Coote, on Mortgage, 307. However, the cases hereafter cited appear to support the principle of the case of *Tate* v. *Wellings*. See the observations of the Court in *Maddock* v. *Rumball*, 8 East, 307; *post*, p. 252. It is in point of fact only contracting for what the Court has decreed. *Forrest*

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the sum of one thousand pounds, five *per cent.* Bank Annuities, in the fund commonly called Navy five *per cent.* Bank Annuities (being the amount of five *per cent.* Bank

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v. *Elwes, post,* p. 260. It is only fixing the value at which the stock is to be taken, instead of giving the obligee the advantage of recovering damages at his election, either according to the value on the day it is to be replaced, or on the day of trial. *Vide post,* p. 259.

An agreement for the purchase of stock, to be transferred at a future day, at a price below the then value, is not usurious.

The case of *Pike* v. *Ledwell* and *Ann Monprivatt,* 5 Esp. N. P. C. 164, was an action of debt on bond. The defendant having first craved oyer of the bond, which recited, that one Richard Monprivatt the elder, by his will bequeathed (*inter alia*) 400*l.* in the three *per cent.* consols to his wife, Ann Monprivatt (one of the defendants), her heirs and assigns, provided that she continued sole and unmarried, but, in case she married again, then he bequeathed the same to his son, Richard Monprivatt, and his daughter, share and share alike; and in case either his son or daughter should happen to depart this life before the event of his wife marrying, the whole to go to the survivor or survivors on their attaining the age of twenty-one years, or marriage; and reciting, that the daughter had departed this life; and that the said Richard Monprivatt the younger would be entitled to the said 400*l.* stock in case of his mother's marriage, or his attaining the age of twenty-one years; and that his said mother was desirous of advancing her son, and had agreed to sell and dispose of the sum of 400*l.* stock to Josiah Pike (the plaintiff) for 160*l.* to be transferred to the said Josiah Pike, when her said son should arrive at the age of twenty-one years: the recital then stated the sale. The condition of the bond was, that, if Ann Monprivatt and Richard Monprivatt should, within seven days after the 11th day of February, 1804, on which day he would be of age, well and truly transfer the said 400*l.* stock, or pay to Pike the value of 400*l.* consolidated Bank of England stock, on the said last-mentioned day, then the obligation to be void. The defendants then pleaded—first, *non est factum;* and secondly, that the contract was usurious. It was proved, that the value of the 400*l.* stock, when the agreement was made, was 240*l.*, and at the time of the action brought, 225*l.* It was contended, that this was usury; for, as the stock was worth 240*l.*, and the plaintiff had only paid 160*l.*, he had gained 80*l.* by his bargain, and the dividends in the mean time [the dividends are not mentioned in the bond]; that it might be said there was a contingency, because the three *per cents* might fall to twenty or thirty *per cent.*; but that this was an impossible supposition. But Lord *Ellenborough* said, that, whatever remedy the defendant might have in equity, on the ground of this being a catching bargain, he had none at law; contingency in the thing purchased was incompatible with the idea of usury, in which the principal must always be certain. It was admitted, that, if the stock, when transferred to the plaintiff, would be worth but

Annuities, which the said [*obligee*] hath sold and disposed of, at the instance and request, and for the accommodation, of the said [*obligor*], and applied the produce for his (being amount of stock sold for obligor's benefit);

160*l.*, it would not be usury; that the stock would suffer that most extraordinary depreciation, was very improbable, but still it was within the reach of possibility. He therefore could not say that there was not some contingency in the transaction, and he was consequently of opinion, that the contract was not usurious. *Pike* v. *Ledwell*, 5 Esp. N. P. C. 164. In this case, the doctrine of contingency is carried farther than it has ever before been carried; and an accident, barely within the verge of possibility, is made as effective as one that may probably occur. In *Chesterfield* v. *Janssen*, Mr. Justice *Burnet* observed that the *slightness* or *reality* of the risk seems to be the only rule directing the judgment of the Court; and that, if a bond were payable, in case one out of twenty ships, bound from Newcastle to London, arrived safe, that would be a contingency for which the statute would be too hard: so, if a contract were made, if the packet should return to Dover from Calais, at a season of the year in which there is no danger. 2 Ves. sen. 143. And surely the loss of twenty ships between Newcastle and London, or the loss of the packet between Dover and Calais, in fair weather, would be a matter of less surprise than the fall of the stocks to 20 or 30 *per cent.* See *Clayton's* case, 5 Co. 70 b; *S. C. Reynolds* v. *Clayton*, 2 And. 15; Moore, 397. But, whether or no this be too great an extension of the principle, the principle itself will remain unimpaired.

An accident, barely within the verge of possibility, has been made as effective as one that may probably occur.

It is also to be observed, that Mr. Justice *Ashhurst*, in describing the transaction in *Tate* v. *Wellings*, 3 Durnf. & East, 538, used these words: "The agreement was, that the defendant should have the use of the money, which was the produce of the stock, paying the same interest which the stock would have produced, with liberty to replace the stock on a certain day, till which time the lender was to run the risk of the fall of the stocks; but he stipulated, that, if it were not replaced by that time, he would not run that risk any longer, but would be repaid the sum advanced at all events. And, from this contract, he derived no advantage; for he was only to receive in the mean time the same interest which the stock would have produced."

Now, in the case of *Moore* v. *Battie*, a similar risk was to be encountered, with this difference; that, in the one case, the money to be repaid was the money *actually received;* whereas, in the other, it was only the nominal value. But this will not necessarily be an advantage to the lender; because stock may be, and frequently is, above its nominal value; so that it seems indifferent which of the two sums is taken. It will not, therefore, be too much to suppose, that *Moore* v. *Battie* is over-ruled by *Tate* v.

for paying the amount of dividends in the mean time;

benefit, and under his direction;) *And* if, in the mean time, and until such trsnsfer shall be made, the said [*obligor*], his heirs, executors, or administrators, or any of

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Wellings. This is Mr. *Comyn's* conclusion, and it seems to be the correct conclusion. Comyn on Usury, 112.

Agreement to transfer so much stock on a future day, as a debt would purchase at the present day's price, and such interest as the same would have produced, as stock, in the mean time, is not usurious.

In another case, the plaintiff declared upon a bond, dated the 19th of November, 1803, for 972*l.* 9*s.*; and, upon a plea of usury, it appeared, that the defendant had been indebted to the plaintiff in 486*l.* 4*s.* 6*d.* for which the plaintiff had sued him; but, being unable to pay it, he agreed, that, in consideration the plaintiff would forbear his action till the 19th of November, 1804, upon the defendant's giving him a bond to transfer to the plaintiff, on the 19th of November, 1804, so much stock as 486*l.* 4*s.* 6*d.* would purchase at the then present day's price, which would amount to 908*l.* 16*s.* 7*d.*, *together with such interest as the same would have produced, as such stock,* in the mean time. Lord *Ellenborough* having left it to the jury to say whether this were a fair transaction, or a mere colour for usury, they found for the plaintiff. And, on a motion for a new trial, "All the Court agreed, that this was not usury; as the amount of the sum to be paid by the defendant depended upon a contingency: and, if the stocks had fallen in the mean time to 50*l.*, the plaintiff might have received less than his principal and interest would have amounted to. That this was no more usury than an agreement to replace stock lent; which, though once contended to be usury, if more than the principal and *legal* interest were thereby obtained, had been long settled to be legal. If, indeed, this had been a mere colour for usury, it would not have availed; but that was negatived by the jury, and nothing appeared to impeach the fairness of the transaction." *Maddock* v. *Rumball*, 8 East, 304, in the year 1807.

Agreement to repay a debt, or, at creditor's option, to transfer so much stock as debt would purchase on a given day, is usurious;

But, where there was a contract for the repayment of a debt, *or, at the option of the creditor,* to transfer so much stock as the amount of the debt would have produced on the day it was payable, Sir *William Grant,* Master of the Rolls, held this to be usury. For, the principal and interest *being secured,* the creditor might take the opportunity of a rise in the stocks to make his election; and by electing to have it transferred at such a rise, he would be sure to be a gainer, while it was impossible that he could ever sustain any loss. *Barnard* v. *Young,* 17 Ves. 44.

although the stipulations be contained in separate instruments.

[And the principle is not varied by the circumstance of the agreement to repay the principal and interest, and the agreement to transfer the stock and pay the dividends, being contained in separate instruments. Thus, where, by agreement between A. and B., after reciting that B. had for the accommodation of A. sold out 400*l.* 3 *per cent.* consols, which produced 223*l.*, which B. had advanced to A.; A. agreed with B., on the next transfer day after the expiration of one year, or at any subsequent transfer day, when requested, to transfer unto B., his executors, &c., 400*l.* consols, and

them, should half yearly, on the days appointed for payment of dividends on the said Navy five *per cent.* Annuities: that is to say; on the —— day of ——, and the —— TO TRANSFER STOCK AFTER NOTICE AND PAY DIVIDENDS IN MEAN TIME.

pay the dividends in the mean time. At the same time, A. executed to B., a bond conditioned for the payment of 223*l.* and interest, in one year. The price of stock having much risen, an action was brought on the agreement, which was resisted on the ground of usury; and the Court held, that the case could not be distinguished from *Barnard* v. *Young*. The agreement was therefore void. *White* v. *Wright*, 3 Barn. & Cress. 272; *S. C.* 5 Dowl. & Ryl. 110.]

Result of the cases as to contracts to replace stock at a future day, according to the then state of the market.

With regard, therefore, to contracts to replace stock at a *future* day, *according to the then state of the market;* it is clear, that, if the lender be not certain whether, by the stock's being replaced at a given day, he shall be a loser or gainer, any gain which he may obtain by the replacing, will not taint the agreement with usury; but if, on the other hand, he has so made the agreement that he is secure from loss, and has a chance of gain, this, by taking away the contingency, deprives the transaction of its legality.

If the exact value of the stock to be sold or replaced has been previously estimated by the parties, so that all is certainty, and nothing contingent, the transaction will be usurious.

And where the exact value of the stock to be sold or replaced has been previously estimated by the parties, so that all is certain, and nothing contingent, the transaction will be usurious. Thus, in an ejectment to recover possession of mortgaged premises, it appeared that the mortgage was made upon a selling of stock. The mortgagor had applied for money to the mortgagee, who told him that all his money was in the funds, and that to sell out stock at that time would be a considerable loss, stock then standing at 73; but that if he would take it at 75, he should have the sum he wanted. The mortgagee consented to this, and received 1,500*l.* in stock valued at 75; this he sold the same day, when the current price of stock was 72¼, by which he lost between 50*l.* and 60*l.* Upon proof of these facts, Lord *Kenyon* held the transaction usurious, and nonsuited the plaintiff. *Doe* dem. *Davidson* v. *Barnard*, 1 Esp. N. P. C. 11.

So, in *Boldero* and Another v. *Jackson*, 11 East, 612, where the plaintiffs had made advances to the defendant, and credited them with 25,000*l.* at a time when the 3 *per cents.* were at 50; in consideration of which, afterwards, in October, when the 3 *per cents.* were at 51¼, he undertook to purchase 50,000*l.* stock in their names, and to account for the dividends thereon from Midsummer-day then last, it was allowed on all hands that this was usury.

[Again, where A., being indebted to B. in a sum of stock, the proceeds of which had been some time before advanced to him, covenanted to replace it and pay the dividends by instalments, on certain days, and some of the instalments not being paid, it was subsequently agreed that

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day of —— in each year, well and truly answer and pay to the said [*obligee*], his executors, administrators, or assigns, such sum or sums of money as shall be equal to the

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the transaction should be considered as a loan of money, and that B. should, at a certain period, repay the sum which the stock originally yielded, with interest at 5*l. per cent.*, but which sum greatly *exceeded the value of the stock at the time of the last-mentioned agreement.* It was held that this agreement was usurious and void. *Parker* v. *Ramsbottam*, 3 Barn. & Cress. 257, *S. C.* 5 Dowl. & Ryl. 138. And here it may be noticed that, in this and several other cases, it has been held that, where an usurious agreement is engrafted on a *boná fide* debt, the effect of declaring that agreement to be void, is to set up the pre-existing contract, the validity of which remains unimpeached by the subsequent transaction. See *Gray* v. *Fowler*, 1 H. Blac. 462. And see cases referred to *ante*, p. 224.]

Usurious agreement in regard to a *boná fide* debt, being void, the debt is revived.

Continuation contracts are, it seems, usurious.

So, it seems, what are called *continuation contracts*, are usurious. Thus, one Pidding being indebted to Roberts and another, who were stock brokers, to the amount of 8,237*l.* 10*s.*, they proposed to him to continue the loan of this money till the 10th of January following, on his pledging 10,000*l.* omnium with them, on which they were to advance an instalment of 1,000*l.* on the 15th of December, and which they were to return on the 10th of January, at three-eighths higher than the price on the 15th of December. He agreed to the proposal, and it was carried into effect. He accordingly, on the 10th of January, upon his receiving back his scrip receipts for the 10,000*l.* omnium, gave them a cheque for 9,275*l.* which was duly paid. This total was composed of 8,237*l.* 10*s.*, the original debt; the 1,000*l.* instalment; and 37*l.* 10*s.* for the three-eighths; which last sum is more than at the rate of 5*l. per cent. per annum* for the money forborne. The credit of Pidding was, however, somewhat shaken upon cross-examination, and no very satisfactory account was given of the nature of a continuation contract. Lord *Ellenborough* said, that, as far as could be discerned from the evidence, there was no contingency in the transaction; and whether the market rose or fell, the lender must have recovered his principal, together with the advance upon the price of the omnium. If so, where that advance is above the legal rate of interest, the transaction is undoubtedly usurious; and, in this case, if the jury believed the witness, they must find for the plaintiff. His Lordship then pointed out some improbabilities in Pidding's testimony; and the jury found for the defendants. *Smadley, qui tam*, v. *Roberts* and Another, 2 Camp. 607.

II. 1st. 500*l.* penalty on buying or selling stock of which they

II. 1st. It was formerly doubted whether a loan of stock was lawful; or whether it was not prohibited by the 7 Geo. 2, c. 8, s. 8, which is as follows: "Whereas it is a frequent and mischievous practice for persons

sum or sums of money which he or they would have been entitled to receive on and for the said sum of one thousand pounds five *per cent.* Bank Annuities, if, and in case the

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to sell and dispose of stocks, or other securities, of which they are not possessed: Be it, therefore, further enacted, by the authority aforesaid, that all contracts and agreements whatsoever, which shall, from and after the said first day of June, one thousand seven hundred and thirty-four, be made or entered into for the buying, selling, assigning, or transferring of any public or joint stock or stocks, or other public [British—*Henderson* v. *Bise*, 3 Stark. 156] securities whatsoever, or of any part, share, or interest therein, whereof the person or persons contracting or agreeing, or on whose behalf the contract or agreement shall be made, to sell, assign, and transfer the same, shall not, at the time of making such contract or agreement, be actually possessed of, or entitled unto, in his, her, or their own right, or in his, her, or their own name or names, or in the name or names of a trustee or trustees, to their use, shall be null and void to all intents and purposes whatsoever; and all and every person and pessons whatsoever, contracting or agreeing, or on whose behalf, and with whose consent, any contract or agreement shall be made, to sell, assign, or transfer, any public or joint stock or stocks, or other public securities, whereof such person or persons shall not, at the time of making such contract or agreement, be actually possessed of, or entitled unto, in his, her, or their own name or names, or in the name or names of a trustee or trustees, to their use, or their own right, as aforesaid, shall forfeit and pay the sum of five hundred pounds, to be recovered by action of debt, bill, plaint, or information, in any of his Majesty's courts of record at Westminster, in which no essoin, privilege, protection, or wager of law, or more than one imparlance, shall be allowed; one moiety thereof to the use of his Majesty, his heirs and successors; and the other moiety thereof to the use of him, her, or them, who shall sue for the same: and all and every broker or brokers, agent or agents, who shall negotiate, transact, or intermeddle in the making, or procuring to be made, any such contract or agreement as aforesaid, and shall know that the person or persons, by whom or on whose behalf such contract or agreement shall be made, is or are not possessed of, or entitled unto, the stock or security concerning which such contract or agreement shall be made in his, her, or their own name or names, or in the name or names of a trustee or trustees for their use or right, shall, for every such offence, forfeit and pay the sum of one hundred pounds, to be recovered by action of debt, bill, plaint, or information, in any of his Majesty's Courts of record at Westminster, in which no essoin, privilege, protection, or wager of law, or more than one imparlance, shall be allowed; one moiety thereof to the use of his Majesty, his heirs and successors, and the other moiety thereof to the use of him, her, or them, who shall sue for the same."

are not actually possessed at the time of the contract.

100*l.* penalty on brokers' agents negotiating such contracts.

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same had been purchased and transferred, or had continued in his or their name or names, (being the same sum of one thousand pounds five *per cent.* Bank Annuities, and

A loan of stock to be replaced on a given day, is not within the stock-jobbing act.

The question was first tried in 1799, in an action of *assumpsit*, before Lord *Kenyon*, when a verdict was found for the plaintiff, subject to the opinion of the Court of King's Bench. The circumstances were, the plaintiff, Sanders, who was a clergyman, lent the defendant, Kentish, who was a stock-jobber, 3,000*l.* four *per cent.* annuities; the defendant Hawksley, was a surety with Kentish for the re-transfer. The defence set up to the action by the defendants was, that the loan was within the prohibition of the 7 Geo. 2, c. 8. It was answered, that the transaction was within the saving of the 11th section; namely, "That nothing in this act contained shall extend, or be construed to extend, to hinder or prevent any person or persons from lending any sum or sums of money on any public or joint stock, or other public securities whatsoever, or any part, share, or interest therein, or to prevent or hinder any defeazance, contract, or agreement, being made and entered into for the re-delivering, assigning, or transferring such public or joint stock, or other public securities, or any part, share, or interest therein, upon the re-payment of the sum or sums of money which shall have been lent and borrowed thereupon, with interest for the same, so as no premium or other consideration whatsoever be paid to or received by the person or persons lending such money, for or in consideration of such loan, more than legal interest." In this opinion the Court coincided. Lord *Kenyon* reprobated strongly the conduct of the defendant Kentish, he being a stock-jobber, and therefore acquainted with the statute; and he remarked, the intention of the legislature is to be collected from the whole act taken together. The act is intituled, "An act to prevent the infamous practice of stock-jobbing;" but, if the defendant's objections are to prevail, the title of the act ought to be altered, and it should run thus: "An act to encourage the wickedness of stock-jobbers, and to give them the exclusive privilege of cheating the rest of mankind." *Sanders* v. *Kentish*, 8 Durnf. & East, 162.

Agreement to transfer so much stock on a future day, as a debt would purchase at the present day's price, and such interest as same would have produced as stock in the mean time, is not within the stock-jobbing act.

And in the above-mentioned case of *Maddock* v. *Rumball*, 8 East, 304, it was contended, that it was a transaction within the prohibition of the stock-jobbing act, 7 Geo. 2, c. 8. But, *per curiam*, "This was in effect a loan of stock. The plaintiff would have purchased stock at the price it stood at on the 19th November, 1803, if he had received his debt then; but he was content to take his debt in stock, to the same amount, at a future day: that is the case with every contract for the replacing of stock. The intention of the parties to a loan of stock, is, that it should be sold, and the same quantity of stock re-purchased at a future period by the borrower." The rule was refused; whereby the Court held, that it was not within the stock-jobbing act.

the amount of the dividends thereon, as are further secured to the said [*obligee*], his executors, administrators,

reference to collateral security;)

So, in *Clark* v. *Giraud*, 1 Madd. Rep. 511, where C. being indebted to G. in 1,000*l.*, agreed to transfer, within a given time, 100*l. per annum*, long annuities, at the then price, and in the mean time pay G. the dividends; and that the debt of 1,000*l.* should constitute part of the purchase-money. The stock was not purchased at the time, and there was a rise in the price of the stocks. Sir *Thomas Plumer*, Vice-Chancellor, held that the agreement was not usurious, nor within the stock-jobbing act; and a motion for an injunction was refused.

In equity, agreement to transfer stock within a given time is not usurious, nor within the stock-jobbing act.

II. 2. But, if the stock or money be lent *for the express purpose* of settling losses incurred in an illegal stock-jobbing transaction, and be so applied by the borrower, it cannot be recovered by the lender, although he was no partner in the stock-jobbing transaction. Thus, in *Cannan* and Another v. *Bryce*, 3 Barn. & Ald. 179, the leading facts were these: Amos and Sutherland were merchants in partnership, and in March, 1814, Amos, without the knowledge of Sutherland, entered into an illegal stock-jobbing transaction, by which he sustained so heavy a loss, that he was unable to pay it, either with his own private funds or with the funds of the partnership. The defendant lent the produce of 5,000*l.* 4 *per cent.* consols, *for the purpose of paying such loss*, and it was applied for that purpose. In consideration of this money so lent, Sutherland joined Amos in a bond to the defendant, which bond, by some mistake, had no condition annexed. In consequence of this it was afterwards cancelled, and another bond in the penal sum of 7,000*l.* was executed by the same parties on the 10th March, 1815. The condition of this bond was, "to replace the stock on or before the 18th September then next, and in the mean time to pay the dividends." The stock was not transferred in pursuance of the condition of this bond; and the firm of Amos and Co. became very much embarrassed before the 18th September, 1815; and Sutherland having committed an act of bankruptcy on the 27th August preceding, went to America, and remained there till after the bankruptcy of Amos. During his absence, Amos had the sole management of the business. Amos afterwards executed to the defendant, at his request, three several deeds of assignment of three several cargoes; the two first of which had been shipped on account of Sutherland and Amos, and the third on account of Amos alone. These deeds were executed by Amos only. On the 17th January, 1816, Amos committed an act of bankruptcy; and on the 9th Feb. following, a joint commission issued against Amos and Sutherland. In April, 1817, the defendant received sums of money on account of the proceeds of each of the three several cargoes, but not enough to cover the debt due on the

II. 2d. Stock, or money lent for the purpose of paying losses incurred in illegal stock-jobbing, and so applied by the borrower, cannot be recovered by the lender, although he was no partner in the stock-jobbing transaction.

TO TRANSFER STOCK AFTER NOTICE, AND PAY DIVIDENDS IN MEAN TIME.

or assigns, by the provisions of a certain indenture of five parts, bearing even date with the above-written bond or

bond. In an action of *assumpsit* by the assignees, for money had and received, &c., the jury found a verdict for the plaintiffs, subject to the opinion of the Court of King's Bench on the case; and it was expressly found by the jury, that the defendant was not a *partner* in the stock-jobbing transaction. Lord Chief Justice *Abbott*, in delivering the judgment of the Court, said, amongst other things, "another point was made upon the effect of the assignments executed, under the circumstances stated, by Amos alone. Upon this point, it is only necessary to observe, that, admitting it to be competent to one partner, after an act of bankruptcy committed by another, to dispose of their partnership property in discharge of legal demands upon the partnership; yet, it is not competent for him to do so in discharge of a demand to which the partners are not by law liable; and we think the partners were not liable in the present case, because we think the loan was illegal, and the securities void. By the statute 7 Geo. 2, c. 8, s. 5, upon which the objection to the loan in this case arises, it is enacted, "that no money or other consideration shall be voluntarily given, paid, had, or received, for the compounding, satisfying, or making up, any difference for not transferring any public stock, or not performing any contract or agreement stipulated to be performed; but that every such contract and agreement shall be specifically performed: and every person who shall voluntarily compound, make up, pay, satisfy, take, or receive such difference money, &c., shall forfeit the sum of 100*l.*" Then, as the statute in question has absolutely prohibited the payment of money for compounding differences, it is impossible to say that the making such payment is not an unlawful act; and, if it be unlawful in one man to pay, how can it be lawful for another to furnish him with the means of payment? It will be recollected, that I am speaking of a case wherein the means were furnished with a full knowledge of the object to which they were to be applied, and for the express purpose of accomplishing that object. And we think the present case cannot be distinguished in principle from that of the druggist, who sold to a brewer, for the purpose of being mixed with beer, certain drugs, which the latter was prohibited by an act of parliament from mixing with beer. I allude to the case of *Langton* and Others v. *Hughes* and Another (1 Maule & Selw. 593), wherein it was decided, that the druggist could not recover the price of the drugs sold for that unlawful purpose. And if the defendant acted unlawfully in lending his money to the bankrupts, he could not have sued them for recovery of payment; because no suit can be maintained upon an unlawful act: and if recovery could not be enforced at law upon the contract of lending, neither could recovery be enforced upon a bond given for the performance of that contract: the

obligation, and made, or expressed to be made between, &c.); *And* if the said [*obligor*], his heirs, executors, ad- for making transfer, and paying interest,

bond was not less void than the contract; and if the bond was void, the assignments mentioned in the case, which were only in furtherance of the bond, and which were made by one of the partners after an act of bankruptcy committed by the other, cannot give to the defendant a right to retain the proceeds of the goods against the plaintiffs, who claim under a commission against both the partners for the benefit of the lawful creditors of both, such commission being grounded upon acts of bankruptcy committed by each of them, before any of the proceeds of the goods had come to the hands of the defendant in pursuance of the assignments." The distinction taken in *Faikney* v. *Reynous*, 4 Burr. 2069, between *malum prohibitum, and malum in se,* was expressly disallowed in the case of *Aubert* v. *Maze*, 2 Bos. & Pull. 371. And in the above case of *Cannan* v. *Bryce*, the Court said, " Indeed, we think no such distinction can be allowed in a Court of law; the Court is bound, in the administration of the law, to consider every act to be unlawful which the law has prohibited to be done.

No distinction between *malum prohibitum*, and *malum in se.*

Every act is unlawful which the law has prohibited.

III. In the before-cited case of *Sanders* v. *Kentish*, 8 Durnf. & East, 162, it was held, that, as the defendant failed in his engagement to replace the stock on the day appointed, the plaintiff might maintain an action against him to recover the value of the stock on the day appointed for the transfer, although the stock had fallen in value before the trial. 2 East, 212. And in *Shepherd* v. *Johnson*, 2 East, 211, it was held, that, in estimating the measure of damages in an action for breach of the condition of a bond to replace stock on a given day, it is not enough to take the value of the stock on that day, if it have risen in the mean time, but the highest value as it stood at the time of the trial; there being no offer of the defendant to replace it in the intermediate time, while the market was rising. Mr. Justice *Grose* said, " the true measure of damages in all these cases is that which will completely indemnify the plaintiff for the breach of the engagement. If the defendant neglect to replace the stock at the day appointed, and the stock afterwards rise in value, the plaintiff can only be indemnified by giving him the price of it at the time of the trial. And it is no answer to say, that the defendant may be prejudiced by the plaintiff's delaying to bring his action; for it is his own fault that he does not perform his engagement at the time; or he may replace it at any time afterwards, so as to avail himself of a rising market." Mr. Justice *Lawrence* said, " Suppose a bill were filed in equity, for a specific performance of an agreement to replace stock on a given day, which had not been done at the time; would not a Court of equity compel the party to replace it at the then price of the stock, if the market had risen in the mean time?" The

III. If the obligor do not replace the stock on the day appointed, the obligee may recover the value of the stock, either on the day appointed for the transfer, or on the day of trial.

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ministrators, or assigns, should make the transfer of the said sum of one thousand pounds five *per cent.* Bank An-

same measure of damages was adopted in a case of *Payne* v. *Burke*, Sittings after Michaelmas Term, 1799, by Lord *Eldon*, when he was Chief Justice of the Court of Common Pleas. So, the cases, *Dutch* v. *Warren*, 2 Burr. 1010, 1011, *S. C.* 1 Str. 406, (but not so well reported), and *Isherwood* v. *Seddon*, cited 2 East, 212, appear to be now over-ruled by the last cited cases, and by the following.

Stock not being transferred at time appointed, and penalty of bond being forfeited, it has been held in equity, that obligee is entitled to the value of the stock at time of transfer, and interest at five *per cent.*

In *Forrest* v. *Elwes*, 4 Ves. 492, the obligee transferred stock to the obligor, upon bond, with a condition to replace the stock six months after the date, and in the mean time to pay interest at five *per cent.* The stock not being replaced, and being depreciated, Lord *Alvanley*, Master of the Rolls, held, that the obligee was entitled to the *value* of the stock at the time of the transfer, with interest at five *per cent.* to the date of the Master's report; credit being given for some payments on account of the principal. This case was decided on the above-mentioned principle, of the fair measure of the damage sustained by the breach of the condition, by not transferring the stock at the time appointed, in consequence of which the penalty of the bond became forfeited at law: and also, on the habit of the Court as to compensation, where a trustee improperly sells out stock; in which case the *cestui que trust* has an opportunity to have either the stock, or the money produced by it, with interest. 4 Ves. 497.

On a bond, conditioned for replacing stock, the obligee is not entitled to special damages for a profit he might have made, if it had been sooner replaced, unless he shews that he demanded payment for that express purpose.

In *M'Arthur* v. Lord *Seaforth*, 2 Taunt. 257, the bond was dated the 27th January, 1801, and given by the defendant to the plaintiff in the penalty of 6,000*l.*, reciting a loan from the plaintiff to the defendant of 3,200*l.*, five *per cent.* stock, usually called the Loyalty Loan; and the condition was, that the defendant should re-transfer 3,200*l.* like stock, on or before the 27th January, 1804; and in the mean time account for and pay the plaintiff the half-yearly dividends. The stock, when first borrowed and converted into money by the defendant, had produced only the sum of 2,800*l.* On the 23d of February, 1804, the plaintiff acquainted the defendant that an option was given to the holders of the loyalty loan, to be paid at par by government, after six months' notice from the 11th March then next; and suggested, that, as the stock was then about 93½, perhaps the defendant might think it a proper time to replace the 3,200*l.*, that the plaintiff might be able to avail himself of the opportunity of giving notice of his desire to be repaid at par six months after, at which time he should have occasion for the money. An option was also given to holders of that stock, to commute their stock for three *per cents.*; but the plaintiff did not express to the defendant any wish to take three *per cents.* At the trial, several years after the time appointed for replacing the stock, the plaintiff contended, that he was entitled to recover 3,923*l.* 17*s.* 3*d.* sterling, which would be the value of three *per cents.* in case he had availed himself of the latter offer

nuities, and pay the amount of the dividends thereon, free and clear of and from all deductions and abatements

free from all deductions.

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of government. The defendant had, before the trial, offered to repay the sum of 3,200*l.*, being the amount at par of the stock lent. It was held, that the plaintiff was only entitled to 3,200*l.*, with the interest due thereon, up to the day of executing the writ of enquiry of damages: that he was not entitled to recover the price of so much three *per cent.* stock as he might have obtained in exchange for the five *per cents.* he not being entitled to special damages for a profit he might have made if the stock had been sooner replaced, unless he had shewn that he demanded payment for that express purpose, and that he should call on the defendant to pay the difference if he did not replace the stock.

IV. In the case of a loan upon a parol engagement to give security to replace stock by a given day, the positive contract failing by an intervening bankruptcy, proof may be made in respect of the contract implied by law from the loan. *Ex parte Coming*, 9 Ves. 115.

IV. Loan on parol agreement to give security to replace stock, positive contract failing by bankruptcy, proof may be made under implied contract.

If a person lends a trader stock in the public funds, to be replaced as stock, without naming any particular time at which it is to be invested; and he becomes a bankrupt before he has been required to replace the stock, it is a contingent debt, and cannot be proved under the commission. *Utterson* v. *Vernon*, 3 Durnf. & East, 539, 4 Durnf. & East, 570 †.

Lord *Kenyon*, in delivering the unanimous opinion of the Court, said, "the question in this case depends on a simple principle of law, which cannot be doubted. It is clear, that where one person, previous to his

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[† But by the late bankrupt act (6 Geo. 4, c. 16, s. 56), "if any bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency, which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt, and the commissioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon, or if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividends with the other creditors, not disturbing any former dividends: provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed."

By stat. 6 Geo. 4, contingent debts proveable against a bankrupt's estate.

It has been held under this section, that, where the payment was not to be required without six months' notice, and no notice had been given previously to the bankruptcy, the debt was nevertheless proveable. *Ex parte Dowman*, 2 Gl. & Jam. 241.]

Debt proveable without notice.

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whatsoever, and without fraud or further delay; *Then* the above-written bond or obligation shall be void and

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bankruptcy, is indebted to another in a precise sum which is ascertained, the latter may prove his debt under the commission: but it is as clear, that where there is only a cause of action existing, where the debt is to arise on a stipulation which has not been broken previous to the time of the bankruptcy, and where the debt remains to be inquired into, there the creditor cannot prove his debt under the commission, and the demand will remain undischarged by the certificate. That here the stock was to be replaced at the request of the plaintiff who lent the stock; and no such requisition having been made previous to the bankruptcy, no certain debt arose, but it rested altogether in damages to be ascertained by a jury. On this short ground, therefore, we are all of opinion, that judgment should be given for the defendants." See also Mr. Justice *Ashhurst's* opinion, 3 Durnf. & East, 547, *S. C.*

[Before the late Bankrupt Act] no proof under a bond to replace stock and pay the dividends; unless forfeited before the bankruptcy.

In *Ex parte King*, 8 Ves. 334, the object of the petition was, to prove under a commission of bankruptcy upon a bond given to secure a loan of stock on the 14th of October, 1801, to be replaced on the 14th of the following October, and the amount of the dividends in the mean time to be paid at the usual periods of paying dividends. The bankruptcy took place on the 9th of March, 1802; and, consequently, before any dividend became payable, such dividend not being due till April. Lord Chancellor *Eldon* said, "it has often been determined in bankruptcy, that if the condition is broken before the bankruptcy, you may prove: *Ex parte Day*, 7 Ves. 301: but there is no instance of admitting the proof, where the condition was not previously broken. If the bond had been forfeited, either as to the capital or the dividend, it would have done; as if, though the bankruptcy was previous to the time at which the stock was to be replaced, a forfeiture had been incurred by not paying the dividend; and the petitioner might, in either case, have proved. The bond is not within the statute, 7 Geo. 1, c. 31; and, therefore, you are without remedy:" excepting as against the bankrupt. *Vide ante*, p. 261.

Agreement to replace stock on demand; if demand had been made before bankruptcy, price might have been proved.

Under an agreement to replace stock upon demand, if the demand be made before the bankruptcy, the price of the stock may be proved. *Ex parte Mare*, 8 Ves. 337.

But it seems, that, if there be a covenant within seven years, or when requested, to transferstock to a certain amount, and the covenantor becomes bankrupt before the expiration of the seven years, and no request has been made, proof will not be admitted upon the covenant, unless secured by a penalty. *Ibid.* [S. P. *Ex parte Alcock*, 1 Ves. & Bea. 176; but now see stat. 6 Geo. 4, c. 156, stated *ante*, p. 260.]

Where by bond, and the collateral security of an equitable mortgage of real estate, stock was secured, to be replaced within three years, and

of no effect, or otherwise shall remain in full force and virtue.

TO TRANSFER STOCK AFTER NOTICE, AND PAY DIVIDENDS IN MEAN TIME.

in the mean time the dividends to be paid as they accrued due; the dividends which had accrued due had not been paid, whereby the bond was forfeited at law: afterwards, and before the expiration of the three years, the obligor became a bankrupt: Sir *John Leach*, Vice-Chancellor, held, that the obligee was entitled to have an immediate sale of the real estate; that the purchase money should be applied in the first place in paying off the interest or dividends accruing * and due upon the stock, and then in replacing, so far as the same would extend, the amount of the stock originally sold out; that the petitioner might prove the amount of so much of the capital stock as the proceeds of the sale should be insufficient to replace; that the petitioner might be paid, out of the separate estate of the bankrupt, a dividend in respect of such proof; and that the assignees were not entitled to have three years to re-transfer the stock. *Ex parte Fisher*, 3 Mad. Rep. 159; 1 Buck, 188, *S. C.*

[*263]

BOND *to two Executors* (*a*) *from two Persons who were Debtors by Bond to the Testator, for investing in the Names of the Executors, within a given Time, so much Stock Three per Cent. Consols, as the Amount of the Debt would purchase at the Date of the Bond; and to pay the Amount of the Dividends in the mean Time.*

TO INVEST AMOUNT OF DEBT IN STOCK, AND PAY DIVIDENDS IN MEAN TIME.

BOND from [*two obligors*], of &c., to [*two obligees*], of &c., in the sum of 4,000*l.*, *ut ante*, p. 179.

Obligation from two to two.

WHEREAS the said [*obligor*] and [*other obligor*], in and by a certain bond or obligation, bearing date on or

Recital of bond from the obligors to obligees' testator.

(*a*) As a general form, the above precedent will be of utility. But, on account of the risk mentioned, *ante*, pp. 261, 262, an executor or adminis-

Executor or administrator should not ac-

TO INVEST AMOUNT OF DEBT IN STOCK, AND PAY DIVIDENDS IN MEAN TIME.

about the —— day of ——, 17—, became, and now stand bound unto [*testator, of the same name as one of the obligees*], deceased, father of the above-named [*obligee*], his executors, administrators, and assigns, in the penal sum of 4,000*l.*; *With a condition* thereunder written, for making the same void upon payment by the said [*two obligors*], or either of them, their, or either of their heirs, executors, or administrators, unto the said [*testator*], deceased, his executors, administrators, or assigns, of the sum of 2,000*l.*, of like lawful money, on the 29th day of September, 1793, with lawful interest for the same [as in and by the said bond or obligation, and the condition thereof, reference being thereunto had will appear.] AND WHEREAS the said [*testator*], the father, departed this life in the month of June, in the year 1794, having first duly made and published his last will and testament in writing, and thereof appointed the said [*obligee*], his son, and [*other obligee*], executors, who, since his decease, have duly proved the same in the proper ecclesiastical Court. AND WHEREAS there is now due and owing unto the said [*obligee*], the son, and [*other obligee*], (as executors as aforesaid), upon and by virtue of the said recited bond or obligation, the said principal sum of 2,000*l.* and no more; all interest thereupon having been paid up to the day of the above-written obligation. AND WHEREAS the said [*obligee*], the son, and [*other obligee*], being desirous of laying out and investing

Death of testator, appointment of executors, and proof of will:

that principal money is due, but all interest paid;

that executors being desirous of investing the

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cept security to transfer stock at a given day, in lieu of a debt, unless he has authority so to do.

trator cannot be advised to consent to such an arrangement as the above in any case, unless, as executor, he has authority by the will so to do, either by express or general terms; or unless, as executor, or administrator, he has the consent of the persons beneficially interested in the money. That such a contract as the above is legal, see *Maddock* v. *Rumball*, 8 East, 304; *ante*, pp. 252, 256.

It is impossible to refrain from presenting the reader with the two following excellent opinions, although the law on the subject has been subsequently pretty clearly settled. The first was given by the profoundly learned Mr. Justice *Holroyd*, and the other by the late Mr. Justice *Chambre*, when they were at the bar. Under the next precedent, there is a very clear opinion on the same point by the late Mr. *Shadwell*.

Mr. Holroyd's opinion on executor's accept-

MR. HOLROYD'S *opinion on the above bond.*

A loan of stock, to be replaced with the same quantity of stock, at a

the said sum of 2,000*l.* so due and owing to them as aforesaid, together with other monies belonging to the estate of the said [*testator*], deceased, in the purchase of stock in the three *per cent.* consolidated bank annuities, have, for that purpose applied to the said [*two obligors*], for the immediate payment of the said sum of 2,000*l.*; and in consequence of such application, and in order that no loss or inconvenience may arise or happen to the estate of the said [*testator*], deceased, on account of the non-payment of the said sum of 2,000*l.* to his said executors, for the purposes aforesaid, on this day, but that the same estate may be in the same situation as if the said sum of 2,000*l.* were paid in on this day, and invested in stock as aforesaid, they the said [*two obligors*] have proposed to the said [*two obligees*], that in lieu and instead of the actual payment to them of the said sum of 2,000*l.*, and in satisfaction thereof, such sum of 2,000*l.* shall henceforth be considered as invested in the purchase of three *per centum* consolidated bank annuities; *And*, to that end, that they the said [*two obligors*] shall and will, on or before the 27th day of November, [which will be in the year of our Lord] 1797, invest, or cause to be invested, on the account, and in the names of, and as the property of, them the said [*obligee*], the son, and [*other obligee*], or the survivor of them, his executors, administrators, or assigns, so much capital stock of the three *per centum* consolidated bank

TO INVEST AMOUNT OF DEBT IN STOCK, AND PAY DIVIDENDS IN MEAN TIME.

sum due, with other monies, in the stocks, have applied to obligors for the immediate payment; in order that no loss may arise, obligors propose that the amount shall be considered as invested this day;

and that obligors will, within a given time invest in executors' names so much stock as the sum would purchase this day:

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subsequent period, with interest to be paid in the mean time, to the amount of the dividends of the stock, has been held to be legal, and not usurious; although the amount of the interest exceeds the rate of five *per cent.* on the sum raised by the stock, in a case where the transaction appears fair and *bonâ fide*, and not intended as a shift to evade the statute, and cover an usurious contract. See 3 Term Rep. 531. The present transaction appears to me, in substance, the same as if, from the time of the bond, the loan was of so much stock, to be replaced by the same quantity of stock, with the payments of the dividends in the mean time. Whether the stock itself, or its produce, or the amount of what would be its produce, is lent, appears to me is, in effect, the same thing. It is not lent as money; for the sum of money, or its amount in money, is not to be returned, but the *quantum* of stock only; which may be in value more, or it may be less than the sum of money. If less, it will be to the disadvantage of the lender: and so far his principal is in hazard; for so much of the stock as shall have

ing a bond to purchase and transfer stock on a future day, at the present day's price, in satisfaction of a debt due to the testator.

TO INVEST AMOUNT OF DEBT IN STOCK, AND PAY DIVIDENDS IN MEANTIME.

annuities as the said sum of 2,000*l.* would (if actually laid out and invested therein), have produced or purchased, according to the custom, market price, or value of the said stock on the day of the date of the above-written obligation: *And* that, in the mean time, until such purchase or transfer shall be made, shall and will (in lieu and satisfaction of lawful interest upon the said sum of 2,000*l.*) pay, answer, and make good unto them the said [*obligee*], the son, and [*other obligee*], their executors and administrators, all such dividends and produce as might or could have been produced, or as they would have been entitled to receive from or upon account of the said stock, in case the said sum of 2,000*l.* had been on the day of the date of the above-written obligation actually laid out in the purchase of the same capital stock of the three *per centum* consolidated bank annuities: *To* which proposal they the said [*obligee*] the son, and [*other obligee*] have, for the accommodation of the said [*two obligors*], consented and agreed. AND WHEREAS the said stock of three *per centum* consolidated bank annuities is, at this the said —— day of ——,1796, the date of the above-written obligation, of the price or value of —— pounds *per centum* and no more.

and to pay the amount of dividends in meantime:

the value of stock this day.

Condition for investing the stock on a given day:

NOW THE CONDITION of the above-written obligation is such, *That*, if the above-bounden [*two obligors*], or

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diminished in price, so much of his principal will he lose. If higher, he will gain. As, therefore, the principal sum of money is not to be returned, but a substitute, which may be of more or less value; and as the principal sum is thereby in part fairly and *bonâ fide* hazarded, it seems to me that the contract is not usurious. See Cro. Jac. 507. 1 Atk. 342, 350. 2 Blackst. 863. Cowp. 115, 793.

But, besides the question of usury, it will be right to advert to another question, whether this contract is or is not illegal, by reason of the 8th section of the stock-jobbing act, statute 7 Geo. 2, c. 8, which declared all contracts null and void, for buying, selling, assigning, or transferring stock, where the person contracting is not, at the time of the contract, possessed of the stock; and inflicts a penalty of 500*l.* on making such contract. I have altered the words of the condition of the bond, because they *expressly* engaged, as they do now in *effect*, to buy and transfer, using the very words of the act. But, as that section of the

either of them, their, or either of their heirs, executors, or administrators, shall and do (should), on or before the 27th day of November, [which will be in the year of our Lord] 1797, well and truly invest, or cause and procure to be invested, on the account and in the names, and as the property of them the above-named [*obligee*], the son, and [*other obligee*], or of the survivor of them, his executors or administrators, in the books of the Governor and Company of the Bank of England, so much capital stock of the three *per centum* consolidated bank annuities as the said sum of 2,000*l.* [of lawful money of Great Britain] would have bought or purchased upon the day of the date of the above written obligation, [if the same had been, on the day of the date of the above-written obligation, laid out and invested in the said stock,] at the said price of —— *per centum* for every 100*l.* stock of the said stock: AND LIKEWISE shall and do (should) answer, pay, and make good unto them the said [*obligee*], the son, and [*other obligee*], or the survivor of them, his executors or administrators, the amount of all dividends, interest, and produce which, in the mean time, would be paid, made, or received for or upon account of the said stock, in case the same had been, on the day of the date of the above-written obligation, actually purchased by or with the said sum of 2,000*l.* at the price aforesaid, and had been invested and continued in the names, and as the property, of them the said [*obligee*],

TO INVEST AMOUNT OF DEBT IN STOCK, AND PAY DIVIDENDS IN MEAN TIME.

and to pay the dividends in the mean time.

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act expressly recites the *mischievous practice of persons selling* and disposing of *stocks* of which they are not possessed, and as the clause is for the express purpose of suppressing *that mischief*, I am inclined to think this case not within the statute. For this is not, nor does it import to be, a sale of stock by the borrower, but a contract, in effect, of a different nature; namely, in effect, a borrowing and replacing of that stock which the money would now produce, and which the lender would immediately have, if the money were now paid to him. The same objection, if it apply to such a case, would, I think, apply to the above case in the Term Reports, and to one in the same book, p. 539; [*vide S. C.* 4 Durnf. & East, 570, *et ante*, p. 261;] but it was not taken, either by the counsel or Court, in either of those cases. However, as the sum is large, as the lenders are executors, and as the consequences either of usury, or of the stock-jobbing act, are so very penal where they attach, I wish the parties in this case not to rely on my opinion alone, which may be mistaken, but

TO INVEST AMOUNT OF DEBT IN STOCK, AND PAY DIVIDENDS IN MEAN TIME.

the son, and [*other obligee*], their executors, administrators, and assigns, *Then*, &c.

to take a further opinion on both these points, before they rely on this bond as a good security: and I think it advisable that they should do so.

G. S. Holroyd,
Gray's Inn, 10th December, 1796.

Mr. Chambre's *Opinion.*

Mr. Chambre's opinion.

The points to be considered in this transaction, and the legal reasoning that applies to them, are stated with great perspicuity, in the opinion of my friend, Mr. *Holroyd.* Upon the question of usury, were I to advise upon a case that had already happened, I should, without hesitation, concur with the opinion he has given, and for the same reasons; especially that which is founded upon the risque of the value of the principal. In advising prospectively, I might remark, that the lender or persons standing in the situation of the executors should run no risque whatever of the penal consequences of usury; and that, in the case referred to in the Term Reports, Lord *Kenyon* appears to lay some stress on the fact, that there was a real loan of stock; and that there must, in such cases, be some little degree of risque in leaving to a jury the fact, whether the mode of transacting the business is or is not a device to cover an usurious contract. In the case cited, a good deal of stress is laid on the finding of a jury.

The latter question, which arises upon the stock-jobbing act, I think by no means clear; and that is a decisive reason for my advising the executors not to run the risque of it. Though this is not the intention of the parties, or of those gaming or speculating contracts, which the act meant to put a stop to, it follows too exactly within the letter of the act, (being a contract for the buying of stock of which the obligors are not possessed), to be perfectly safe: and, though I think there is considerable weight in the argument to support the transaction, yet it appears that there is great uncertainty of the Court's weakening a very beneficial law by nice distinctions or exceptions, in cases comprehended in the terms of such a law†.

A. Chambre,
Gray's Inn, 31st December, 1796.

† The point is now settled by *Maddock* v. *Rumball*, 8 East, 304, *ante*, pp. 251, 256; and see Mr. Shadwell's opinion, *post*, 270.

Bond from Four to One, for replacing East India Stock on Request (a); and for paying the Amount of the Dividends in the mean Time.

TO REPLACE STOCK ON REQUEST, AND PAY DIVIDENDS IN MEAN TIME.

BOND from [*four obligors*], all of &c., merchants and co-partners, to [*obligee*], of &c., in the penal sum of 8,000*l.* *ut ante*, p. 181.

Obligation four to one.

WHEREAS the above-named [*obligee*] hath, at the instance and request of the above-bounden [*obligors*], agreed to lend them one thousand nine hundred and one pounds fourteen shillings, East India stock, standing in the name of the said [*obligee*] in the books of the honour-

Recital of agreement to lend East India stock,

(a) CASE.

Since this bond was given, doubts have been entertained, whether, as it engages to re-invest stock which was not actually standing in the obligors' names at the time of the engagement, it does not come within the penalties 7 Geo. 2, chapter 8, s. 8. And whether, if it does not, it could be proved, in case of a bankruptcy, against the obligors, previous to a notice in writing, requiring the transfer to be made, pursuant to the condition.

Case on the above bond, for Mr. Shadwell's opinion.

Your opinion is desired, whether the bond, in its present state, is valid, and sufficient to enable the obligee to obtain the re-transfer of his stock. And you are also desired to advise, whether any, and what form of notice is necessary from the obligee to the obligors, requiring the transfer at a given time, so as to give the obligee the advantage of proving the bond in case of a bankruptcy.

If you should think the bond is not so perfect as it might have been to answer the purpose, please to make such alterations therein as may be necessary.

I think the bond valid; and that the transaction does not come within the act alluded to. The whole transaction is to be taken together, as I conceive; and then the obligee, the owner of the stock, became, by means

Mr. Shadwell's opinion.

TO REPLACE STOCK ON REQUEST, AND PAY DIVIDENDS IN MEAN TIME.

able the united company of merchants trading to the East Indies; they the said [*obligors*] engaging to replace the said East India stock in the name of him the said [*obligee*] on *demand, and to pay him the amount of the interest and dividends which from time to time would have arisen and accrued to the said [*obligee*] thereon, had the same stood and remained in his name in the books of the said company, by equal half-yearly payments in the mean time.

obligors engaging to replace it on demand, and to pay dividends in mean time.

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AND WHEREAS the said [*obligee*] hath accordingly this day transferred out of his name, and sold the said one thousand nine hundred and one pounds fourteen shillings East India stock, as by the books of the said company, reference being thereunto had, will appear; which sale was made for the use and benefit of them the said [*obligors*], as they do hereby acknowledge.

Recital of having sold stock for the use of obligors.

NOW THE CONDITION of the above-written obligation is such, *That*, if the said [*obligors*], their heirs, executors, or administrators, shall and do (should, *vide ante*, Vol. 2, p. 599), whenever thereunto required by the said

Condition for replacing East India stock, on request.

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of the contract, and at the time of it, a trustee† of the stock for the obligors, although, by their direction, he sold it for their proper use; and the act only makes those contracts for transferring stock at a future time void, where the contractor was not possessed of, or entitled to, the stock, at the time of making the contract. A contract like the present was held good by the Court of King's Bench, in the case of *Tate* v. *Wellings*, 3 T. R. 531.

In case of the obligor's bankruptcy before being required to make the re-transfer‡, I should question the right of the obligee to prove under the

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† Mr. Justice *Bayley*, when at the bar, urged the same distinction two years afterwards, in *Sanders* v. *Kentish*, 8 Durnf. & East, 164. However, the Court did not think the case came within the meaning of the prohibitory clauses in the act, but that it was within the exception in the eleventh section; and did not notice the point urged. Probably there is more ingenuity than solidity in the above distinction. It certainly cannot be applied to cases where a debtor agrees to purchase so much stock on a given day as the amount of the debt would purchase at the time of the contract. *Vide ante*, p. 256.

‡ Failure in paying the dividends would have the same effect. *Vide ante*, p. 262.

[*obligee*], his executors, administrators, or assigns, well and truly, and without fraud or delay, re-transfer and re-purchase unto and into the name or names of him the said *obli-*[*gee*], his executors, administrators, or assigns, in the said books of the said company, one thousand nine hundred and one pounds fourteen shillings East India stock, in lieu of that so transferred and sold by the said [*obligee*], for the use and benefit of the said [*obligors*] aforesaid, so that the said [*obligee*], his executors, administrators, or assigns, shall and may, immediately after such demand made, be reinstated in the entire and absolute possession, use, and disposal thereof: AND ALSO if the said [*obligors*], their heirs, executors, or administrators, shall and do (should), from time to time, and at all times hereafter, in the mean time, and until the said one thousand nine hundred and one pounds fourteen shillings East India stock, shall be so re-transferred and re-purchased as aforesaid, well and truly pay, or cause to be paid, unto the said [*obligee*], his executors, administrators, or assigns, so much money as shall be equal to the interest and dividends which would, from time to time, until such re-transfer and re-purchase, have accrued due and become payable on the said one thousand nine hun-

TO REPLACE STOCK ON REQUEST, AND PAY DIVIDENDS IN MEAN TIME.

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and for paying dividends in mean time.

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commission; but to give him that right, I should conceive that a letter from him to them, merely saying, "I require you to transfer into my name one thousand nine hundred and one pounds fourteen shillings, East India stock, immediately, pursuant to your bond," is fully sufficient.

If the bond had not been already given, I should have recommended an alteration in the obligatory part, as suggested on the first side†; but perhaps it may not be thought worth while to have a new bond, merely to obviate the objection mentioned in the margin. In all other respects the present bond seems substantially right.

LANCELOT SHADWELL,
Lincoln's Inn, 22d March, 1797.

† The alteration suggested is, "we are, jointly and severally, or any two or more of us are, held and firmly bound, &c. Without some such alteration, an action could not be brought against two or three of the four, during the lives of the four.

L. S."

As to this distinction, *vide ante*, Vol. 1, pp. 502, 312, 634; Vol. 2, p. 608; *ante*, p. 182; and see *South* v. *Tanner*, 2 Taunt. 254.

TO REPLACE STOCK ON REQUEST, AND PAY DIVIDENDS IN MEANTIME.

dred and one pounds fourteen shillings East India stock so transferred as aforesaid, by equal half yearly payments in every year; namely, on the —— day of —— and the —— day of —— in every year: being the days on which the said interest or dividends would have become payable,

[*272] and at which * the said [*obligee*] would have been entitled to have and receive the same, had his said East India stock remained in his name: the first payment thereof to begin and be made on the —— day of —— next ensuing the date of the above-written obligation; *Then* the above-written obligation shall be void, and of no effect; otherwise the same obligation shall remain in full force and virtue.

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FOR PAYING LEGACIES AFTER OBLIGOR'S DEATH, UNDER DIRECTIONS OF WILL.

BOND *from a Residuary Legatee to an Executor, for Payment of Legacies after the Obligor's Death, where a Testator gave several Legacies to be paid Six Months after the Death of the Residuary Legatee, with Interest from her Death: and directed her, within one Month from his Decease, to give a Bond to his Executor, for paying the Legacies accordingly; but, if she neglected to give the Bond, he revoked the Bequest to her* (*a*).

Obligation from one to one.

BOND from [*obligor*], of &c., widow, to [*obligee*], of &c., gentleman, in the penal sum of one thousand pounds, *ut ante*, p. 179.

Recital of will bequeathing legacies to be paid three months after obligor's death, with interest from that time.

WHEREAS [*testator*], late of —— above mentioned, gentleman, deceased, duly made and published his last will and testament in writing, bearing date the —— day of ——, 18— ; and thereby gave and bequeathed the sum of two hundred pounds unto his brother, the above-named [*obligee*]; and the sum of two hundred pounds unto his sister S. the wife of F. T.; and he also gave and bequeathed the

[(*a*) As to the effect of such conditions, see 1 Jarm. Pow. Devises, 195, n.]

FOR PAYING LEGACIES AFTER OBLIGOR'S DEATH, UNDER DIRECTIONS OF WILL.

sum of one hundred pounds unto his nephew T. B., and his niece E. B., (children of his late brother T. B., deceased), in equal shares and proportions. *And* the said testator directed, that all the said legacies should be paid at the end of three calendar months next after the death of the above-bounden [*obligor*], together with lawful interest for the same from the day of her death. *And* the said testator, by his said will, provided and declared, that, in case the said [*obligee*] should die in the life-time of the said [*obligor*], all and every the child and children of the said [*obligee*] who should be living at his decease, should stand in his place, and be entitled to the said legacy thereby bequeathed to him as aforesaid, and the interest thereof: * and that, in case the said S. T. should die in the life-time of the said [*obligor*], all and every the child and children of the said S. T. who should be living at her decease, should stand in her place, and be entitled to the said legacy bequeathed to her as aforesaid, and the interest thereof: and that, in case either of the said legatees, T. B. and E. B. should die in the life-time of the said [*obligor*], the said legacy of one hundred pounds, and the interest thereof, should be paid to the survivor of them: and that, in case both of the two last-named legatees should die in the life-time of the said [*obligor*], the said legacy of one hundred pounds, and the interest thereof, should be paid to and equally divided between the said [*obligee*] and S. T. *And* the said testator, by his said will, gave and bequeathed all his personal estate, which was not thereinbefore given and disposed of, and which should not be applied in the payment of his debts, or in defraying his funeral and testamentary expenses, unto the said [*obligor*], in case she should survive him the said testator. *And* the said testator, by his said will, provided and directed, that the said [*obligor*], in case she should survive him the said testator, should, within one calendar month next after his decease, enter into and execute a bond unto the said [*obligee*], his executors or administrators, binding herself, her heirs, executors, and administrators, in the penal sum of one thousand pounds, with a condition for making void the same upon payment of the said legacies and interest, according to the directions of his said will: *but*, in case the said [*obligor*]

in case of legatee's death, his children to be entitled to legacy:

same as to another legatee:

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with executory bequest over:

that testator gave residue to obligor,

and directed her, within one month from his decease, to give a bond to his executor, for paying legacies according to will;

but, if she ne-

glected to give bond, he revoked the bequest made to her:

should refuse or neglect to enter into and execute the said bond, then the said testator did, by his said will, revoke the bequest thereby made to her as aforesaid; and did declare that she should not receive any benefit under his said will.

appointment of executor: testator's death, and proof of will.

And the said testator appointed the said [*obligee*] sole executor of his said will. AND WHEREAS the said [*testator*] hath since departed this life, without having revoked or altered his said will: and the same hath been duly proved by the said [*obligee*] in the proper ecclesiastical court.

Condition for paying legacies and interest after obligor's death, according to the directions of the will.

NOW THE CONDITION of the above-written bond or obligation is such, *That*, if the heirs, executors, or administrators of the said [*obligor*] should well and truly pay, or cause to be paid, the several legacies or sums of money, and interest, by the hereinbefore in part recited will of the said [*testator*] given, or directed to be paid as aforesaid; and for payment whereof the said [*obligor*] was directed to enter into such bond as aforesaid, as and when the same respectively shall become due and payable, according to the directions of the said will; *Then* and in such case the above-written bond or obligation to be void, otherwise to be and remain in full force and virtue.

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FROM PURCHASER, FOR PAYING LEGACIES CHARGED ON LANDS, AND INTEREST IN MEAN TIME.

BOND *from the Purchaser to the Vendor of an Estate charged with Legacies, payable to Two Infants when they respectively come of Age, where it had been agreed, that Part of the Purchase Money, being the Amount of the Legacies, should remain in the Purchaser's Hands,*—FOR PAYING THE LEGACIES *as the Infants come of Age; and, if both or either of them should die under Age, then to pay the Legacies or Legacy to the Vendor, within Three Months:* AND *for paying to the Vendor* INTEREST *on the Legacies, until they shall be respectively paid.*

Obligation from one to one.

BOND from [*purchaser*], of &c., to [*vendor*], of &c., in the penal sum of —— pounds, *ut ante*, p. 179.

Recital of devise of lands, subject to payment of legacies when infants became of age.

WHEREAS [*testatrix*], late of &c., widow, deceased, late mother of the above-named [*vendor*], being entitled to or having a disposing power, amongst other things, of a noblesworth of land in —— aforesaid, made her last will and testament in writing, bearing date on or about the —— day of ——, 18—, and thereby gave to her * eldest son [*vendor*] the said land: *And*, among other bequests, thereby bequeathed to her grandchildren, J. C. and A. C., each of them four pounds, when they came to the age of twenty-one years; which legacy, by virtue of the said will, became well charged upon the said noblesworth of land.

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Recital of lease and release to purchaser;

AND WHEREAS the above-bounden [*purchaser*] hath, by indentures of lease and release, bearing date on or about the —— and —— days of ——, 18—, for a valuable consideration purchased the said land: *And*, thereupon it hath been, and is agreed by and between the said [*vendor*] and [*purchaser*], that

and agreement that part of purchase mo-

FROM PURCHASER, FOR PAYING LEGACIES CHARGED ON LANDS, AND INTEREST IN MEAN TIME.

eight pounds, part of the money to be paid for the said purchase, should remain in the hands of the said [*purchaser*], to be paid and applied in discharge of the several sums of four pounds, or otherwise, as hereinafter is mentioned: *And* that the same should stand charged upon the said purchased premises until the actual payment thereof:

ney, the amount of the legacies, shall remain in purchaser's hands.

Condition for paying legacies as infants come of age:

NOW THEREFORE THE CONDITION of the above-written obligation is such, *That*, if the said [*purchaser*], his heirs, executors, or administrators, should well and truly pay or cause to be paid the said several sums of four pounds a piece to the said J. C. and A. C. respectively, as and when they shall respectively attain the age of twenty-one years: AND, in case both or either of them should die under that age, in which case the legacy of him, her, or them, so dying will not survive to his, her, or their representatives; *Then*, in case the said [*purchaser*], his heirs, executors, or administrators, should well and truly pay, or cause to be paid to the said [*vendor*], his executors, administrators, or assigns, the said legacy or legacies of the said J. C. and A. C., or such of them so dying, within three calendar months next after his or her respective death; AND ALSO if the said [*purchaser*], his heirs, executors, or administrators, should well and truly pay, or cause to be paid to the said [*vendor*], his executors, administrators, or assigns, interest for the said several sums of four pounds and four pounds, or such of them as for the time being shall remain unpaid, henceforth until the same shall become payable, after the rate of four pounds *per centum per annum; Then*, &c.

and if both or either die under age, then to pay to vendor the legacy within three months:

and for paying to vendor interest on legacies until they shall be respectively paid.

BOND *from a Legatee to an Executor, on Payment of the whole Legacy, or a Part of the Legacy,* TO REFUND, *if there should be a Deficiency of Assets.*

LEGATEE TO REFUND, ON DEFICIENCY OF ASSETS.

BOND from [*legatee*], of &c., to [*executor*], of &c., in double the amount of the sum paid, *ut ante*, p. 179.

Obligation from one to one.

WHEREAS [*testator*], late of &c., deceased, by his last will and testament in writing, bearing date on or about the —— day of ——, 18—; gave and bequeathed unto the said [*legatee*], the sum of —— pounds, to be paid within six calendar months next after his the said testator's decease; and appointed the said [*executor*] the executor of his said will: And the said testator died on or about the —— day of —— last past; and shortly after his decease the said [*executor*] duly proved the said will in the Prerogative Court of the Archbishop of Canterbury. AND WHEREAS (*a*) the said [*executor*] hath not yet ascer-

Recital of a will bequeathing a legacy:

death of testator, and proof of will:

that executor has not ascer-

(*a*) If only a part of the legacy be paid, say,

PART PAYMENT.

" AND WHEREAS the said [*testator*], by his said will, bequeathed several other pecuniary legacies, amounting, together with the said [*legacy*] pounds given to the said [*legatee*] as aforesaid, to the full sum of —— thousand pounds. AND WHEREAS the said [*executor*] alleges, that the personal estate of the said [*testator*] will not (as he verily believes) after payment of his debts, funeral expenses, and the necessary charges incident to the said executorship, be near sufficient to pay the whole of the said pecuniary legacies; and he is doubtful whether all the debts owing by the said [*testator*], at his death, are yet come to his knowledge: notwithstanding which he is desirous and willing to pay so much of the said legacies as

Recital that testator gave several other pecuniary legacies:

that the executor believes testator's effects will be insufficient to pay the legacies: and is doubtful whether all his debts are come to executor's knowledge: but that he is willing to pay legacies so far as assets extend:

LEGATEE TO REFUND, ON DEFICIENCY OF ASSETS.

tained the amount of the debts and credits of the said [*testator*], but, as he believeth that the assets of the said [*testator*] will be sufficient to pay his debts, and the several legacies given by his said will, he the said [*executor*] hath agreed to pay to the said [*legatee*] his said legacy of —— pounds, on his entering into the above-written obligation, with such condition as is hereinafter contained.

tained amount of debts and credits; but believing there will be enough to pay debts and legacies, has agreed to pay legacy on having bond.

NOW THE CONDITION of the above-written obligation is such, that, if the personal estate of the said [*testator*] deceased, should not prove sufficient to pay his just debts and funeral expenses, and the necessary charges of the said executorship (*b*), and all the pecuniary legacies given by the said will, then, if the said [*legatee*], his heirs, executors, or administrators, should, within fourteen days next after notice thereof to him or them given in that behalf, well and truly repay to him, the said [*executor*], his executors, administrators, or assigns, the said sum of —— pounds, so paid to him as aforesaid, or so much thereof as shall appear to be more than was coming due to *him out of the personal estate of the said [*testator*], in respect of the said legacy of —— pounds given to him by the

Condition that, in case of deficiency of assets, if legatee should refund,

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the personal estate of the said [*testator*] come to his hands will extend to satisfy and pay, on being indemnified, and saved harmless for so doing. AND WHEREAS the said [*executor*] hath in his hands of the personal estate of the said [*testator*], sufficient to pay all the debts of the said testator yet come to his knowledge, his funeral expenses, and the necessary charges of the said executorship to the date hereof, and also a fifth part of the pecuniary legacies bequeathed by the said recited will. AND WHEREAS the said [*executor*] hath, on the day of the date of the above-written obligation, at the request of the said [*legatee*], and on on his promise of indemnity for so doing, paid unto him the said [*legatee*] the sum of —— pounds, being a fifth part of the sum of [*legacy*] pounds, given him by the said in part recited will as aforesaid."

that, after payment of debts, &c., executor has assets to pay one fifth of legacies;

that he has paid legatee one fifth of his legacy, on his promise of indemnity.

PARTPAYMENT.

(*b*) If only a part of the legacy be paid, say,

" and a (fifth) part of all the pecuniary legacies," &c., *ut supra.*

said in part recited will as aforesaid, in proportion to the other pecuniary legacies under the said will: AND ALSO if the said [*legatee*], his heirs, executors, or administrators, should, from time to time, and at all times hereafter, save, defend, keep harmless and indemnified, the said [*executor*], his executors and administrators, and the estate of the said [*testator*], of and from all costs, charges, damages, and expenses which shall or may happen or come to him or them, or the estate of the said [*testator*], for, or by reason, or means of the said [*executor*] having paid the said [*legatee*] the said sum of —— pounds, in (*c*) full for the said legacy, as aforesaid, or any matter, cause, or thing, relating thereto; *Then*, the above-written obligation to be void and of no effect; otherwise the same obligation to be and remain in full force and effect.

LEGATEE TO REFUND, ON DEFICIENCY OF ASSETS.

and indemnify executor from all costs, &c., by reason of his having paid legacy,

then obligation to be void.

SEALED AND DELIVERED, (being first duly stamped), in the presence of

Attestation.

(*c*) If only a part of the legacy be paid, say, "part of the said legacy," &c. *ut supra*.

PART PAYMENT.

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BOND *from the President, and Two of the Governors of a Workhouse, to Executors, to refund a Legacy given to the Workhouse, in case of Deficiency of Assets.*

GOVERNORS OF WORKHOUSE TO REFUND, ON DEFICIENCY OF ASSETS.

BOND from [*the president and two governors of the London Workhouse*] to [*two obligees*], of &c., in the sum of 100*l.*, *ut ante*, p. 179.

Obligation from three to two.

WHEREAS [*testator*], late of &c., deceased, by his last will and testament, bearing date on or about the —— day of ——, 18—, did give and bequeath unto the London

Recital of a bequest to the London Workhouse;

GOVERNORS OF WORKHOUSE TO REFUND, ON DEFICIENCY OF ASSETS.

appointment of executors; proof of will; and payment of legacy.

Workhouse, a legacy or sum of fifty pounds; and of his said will appointed the above-named [*two obligees*] executors; who, since the testator's death, have duly proved the same: *And* on the day of the date of the above-written obligation, they have paid the said sum of fifty pounds unto the said president, and governors, or unto their treasurer, for the use of the said London Workhouse.

Condition, that if, within six years, deficiency of assets should appear, if the president and governors of the poor for the city of London, within three months after proof of deficiency be made, should refund rateably;

NOW THE CONDITION of the above-written obligation is such, *That*, if, at any time, within the space of six years now next ensuing, there should happen and appear to be a deficiency in the estate of the said [*testator*], to pay and satisfy his just debts which he owed at the time of his decease, as also the legacies given by his said will; then if the president and governors, or their successors, president and governors for the poor of the city of London for the time being, should within three months next after any such deficiency be made to appear to them by the said [*obligees*], their executors, or administrators, by due proof thereof, refund, and pay back unto the said [*obligees*], their executors or administrators, a rateable and proportionable part and share of the said legacy, or sum of fifty pounds, in an average and proportion with the rest of the legatees named in the said will of the said *[*testator*], for and towards the making good such deficiency, if any shall so happen; *Then* the above-written obligation shall be void; otherwise shall be and remain in full force and virtue.

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then obligation to be void.

BOND *for the faithful Service of a Clerk, either to two Partners, or to them and their Executors or Administrators, and notwithstanding an Alteration in the Firm.*

FAITHFUL SERVICE OF CLERK.

BOND from [*principal*], of &c., and [*two sureties*], of &c., jointly and severally, to [*two partners*], of &c., in the penalty of 2,000*l.*, *ut ante*, p. 179.

Obligation from three to two.

WHEREAS the above-named [*two partners*] have lately admitted the above-bound [*principal*] into their service, as their clerk, and have agreed to retain and continue him in their said service, on his obtaining two respectable persons to become sureties for his duly and faithfully accounting to them the said [*two partners*] (*a*), in

Recital of having taken clerk.

(*a*) The above form is adapted to the case where the sureties intend their guaranty should only extend to the faithful service of the clerk while he remains in the employ of the obligees. *Vide ante*, p. 236—240. But if it be intended that they should be guarantees for the faithful service of the clerk while he remains in the service of the obligees, as well as the survivor of them, or their or either of their executors or administrators, and notwithstanding new partners, then say,

FOR FAITHFUL SERVICE AFTER ALTERATION IN FIRM.

" or the survivor of them, their or his executors or administrators, and other the persons or person who shall or may become partners or partner with them, or any or either of them, and their or his executors or administrators, in manner" &c., *ut supra*.

If the clerk is to be employed in an unincorporated public company, as the obligation should be made to trustees, after describing them, add,

TO TRUSTEES OF UNINCORPORATED PUBLIC COMPANY.

" trustees for the society or partnership called the —— —— company."

FAITHFUL SERVICE OF CLERK.

manner hereinafter mentioned, and for his faithful and

The other parts of the bond may be as follows:

Recital of choice, and admission as clerk of a company.

"WHEREAS the said [*clerk*] hath been chosen, and is admitted a clerk in the said —— company; and the said [*sureties*] have agreed to enter into the above obligation, as sureties for the fidelity of the said [*clerk*], while in the service of the said company.

Condition for clerk's faithful service:

NOW THE CONDITION of the above-written obligation is such, that, if the said [*clerk*] do and shall from time to time, and at all times hereafter, during his continuance in the said service of the said company, faithfully, honestly, diligently, and carefully, execute, perform, and discharge the said service; and all and every other services of the said company, wherein he is, shall, or may be employed; or whereunto he is, shall, or may be called:

that he on request, shall deliver just accounts:

And shall, so soon as he shall be thereunto required, give and deliver, in writing, a just and true account of all monies, notes, bills, securities for money, goods and effects whatsoever, which in the said service shall come to the hands of the said [*clerk*], or which he shall be entrusted with by or on account of the said company:

and pay the balance thereof;

And also make good, answer for, and pay, the monies due on the balance of such account to the said company, or such persons as the said company, or the court of directors thereof for the time being, shall appoint:

and to indemnify the company from all losses, &c. by reason of any act done by clerk.

And shall and do, moreover, well and sufficiently save harmless, and keep indemnified, the said company, and the directors and all other members thereof, from and against all losses, costs, charges, damages, and expenses, which shall or may happen or come to them, for or by reason of any act, deed, matter, or thing whatsoever, done or omitted to be done by the said [*clerk*], in or during his said service; then this obligation to be void," &c., *ut supra*.

A bond to the trustees of a public un-incorporated insurance company, conditioned for the good conduct of

For, in *Metcalfe* and others v. *Bruin*, 2 Campb. 422, in an action of debt on a bond, dated 18th June, 1803, in the penal sum of 2,000*l.*, with a similar condition to the above; the defendant, after craving oyer, pleaded: first, *non est factum*; secondly, performance. The replication to the second plea assigned various breaches of the condition by the clerk, from

honest conduct during the time of his continuance in (*b*)

FAITHFUL SERVICE OF CLERK.

the 1st of January 1804, to the commencement of the suit; which were denied by the rejoinder.

a clerk while in the service of the *said company*, remains in force notwithstanding changes among the individual members.

It appeared that the plaintiffs were five of the trustees of the Globe Insurance Company; that this company is unincorporated; but that four years after the date of the bond, the members obtained two acts of parliament, to enable them to sue and be sued in the name of their treasurer; that there has been a continual fluctuation in the members of the company; that in the years 1803-4, and 5, many old members went out and new ones came in; and that there were, generally, upwards of a hundred changes in the course of the year.

For the defendant, it was contended, "that, as soon as there was any change among the members of the company, the bond was at an end. The Globe Insurance Company, not being a corporation, is like any other partnership or mercantile firm: and there is no point of law better established, than that a bond conditioned for the good conduct of a clerk to any partnership, ceases to operate the moment an old member goes out of the partnership, or a new one comes in. The notion that the security is given to the *house*, and not to the individuals composing it, has been long exploded. The defendant might have great confidence in the prudence and diligence of some of the members of the Globe Insurance Company who retired; and he might have such an opinion of the negligence and folly of some who bought in, that he would by no means have become bound for a clerk under their superintendance. But none of the breaches were proved. By the words '*said company*' in the condition, must be understood, the company in existence at the execution of the bond; and that company had ceased to exist, and another partnership was formed, before any of the money had been received by the clerk which he had not brought to account." However, this reasoning was over-ruled; for Lord *Ellenborough* said, "Where a bond of indemnity is given for the conduct of a clerk in a banking-house, or any common partnership, the law is clearly as it has been laid down; and the instant there is a change in the firm, the indemnity is at an end. But *the Globe Insurance Company* is necessarily a flux

(*b*) If for faithful service, notwithstanding an alteration in the firm, say,

FOR FAITHFUL SERVICE AFTER ALTERATION IN FIRM.

"either in the service of the said [*two partners*], or of the (survivors or) survivor of them, their or his executors or administrators, or other the person or persons who shall or may become partners or partner with them, or any or either of them, or their or his executors or administrators: *And*," &c. *ut supra*.

FAITHFUL SERVICE OF CLERK. Agreement to become sureties.

their service: AND the said [*two sureties*], have, at the request of the said [*principal*], agreed to become such sureties, and have for that purpose executed the above-written bond or obligation.

Condition for faithful service of clerk:

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NOW THE CONDITION of the above-written obligation is such, that, if the said [*principal*] shall and do, *from time to time, and at all times, well and satisfactorily account for, and pay over and deliver to the said [*two partners*] (*c*), their executors and administrators, all and every sums and sum of money, and securities for money, goods, and effects whatsoever, which he the said [*principal*] shall receive for their (*d*) or either of their use, or

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body; and its constitution must have been contemplated when the bond was given. This, like other contracts, must be construed according to the intention of the contracting parties. I think the obligor must be taken to have meant the *Globe Insurance Company for the time being*; and I am therefore of opinion that his responsibility is not affected by a change among the members of which it is composed."

The plaintiff had a verdict; and the ensuing term the Court of King's Bench discharged a rule which they had granted, to shew cause why there should not be a new trial. The Court holding, that the intention of the parties to the instrument being apparent, to contract for such service to be performed to the company as a fluctuating body: and the intervention of the trustees removing all legal and technical difficulties to such a contract made with, or suit instituted by, the company themselves as a natural body. *Metcalfe* v. *Bruin*, 12 East, 400.

Bond to the governors of a society unincorporated, ceases after their incorporation.

But where a bond was given to A., B., C., &c., payable to them and their successors, as the governors of the Society of Musicians, conditioned to secure J. H.'s faithfully accounting with them and their successors, governors, &c., as their collector; afterwards the society was incorporated by letters patent, at which time J. H. had duly accounted for all monies collected by him; but, after the incorporation, he received money for which he did not account: It was held, that the obligor of the bond was not liable for such default. *Dance* v. *Girdler*, 1 Bos. & Pull. 34.

FOR FAITHFUL SERVICE AFTER ALTERATION IN FIRM.

(*c*) "or to the survivor of them, their or his executors or administrators, and other the persons or person who shall or may become partners or partner with them, or any or either of them, or their or his executors or administrators, all," &c., *ut supra*.

(*d*) "their, any, or either," &c. *ut supra*.

which shall at any time or times be intrusted to his care by them the said [*two partners*] (*e*), or either of them, or by their, or either of their correspondents or customers, or others to whom they (*f*), or either of them, are or is, or shall or may be liable or accountable: *And* do not at any time embezzle, make away with, obliterate, deface, or in anywise injure any of the money, securities for money, books, papers, writings, goods, or effects of them the said [*two partners*] (*g*), or either of them, or of their, or either of their correspondents or customers, or others to whom they or either of them are, or is, or shall or may be or * become liable or accountable (*h*); *Then*, and in such case, the above-written obligation to be void, and of no effect; otherwise to be and remain in full force and virtue. PROVIDED ALWAYS *nevertheless, and it is hereby declared*, that the said [*two sureties*], or their respective heirs, executors, or administrators, are not separately, or individually, to be liable for more than 1,000*l.* each, parcel of the said sum of 2,000*l.* mentioned in the said above-written bond or obligation.

FAITHFUL SERVICE OF CLERK.

and that he shall not embezzle, &c.

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Proviso, that sureties shall only be liable to a given amount.

SEALED AND DELIVERED, by the above-bound [*principal*], and [*two sureties*], in the presence of

Attestation.

(*e*) "or the survivor of them, their or his executors or administrators, or other the persons or person who shall or may become partners or partner with them, or any or either of them, or their or his executors or administrators, or by their, any, or either of their correspondents," &c., *ut supra.*

FOR FAITHFUL SERVICE AFTER ALTERATION IN FIRM.

(*f*) "they, any, or either of them," &c. *ut supra.*

(*g*) "or the survivor of them, their, or his executors or administrators, or other the persons or person who shall or may become partners or partner with them, or any or either of them, or their or his executors or administrators, or of their, any, or either of their correspondents or customers, or others to whom they, any, or either of them are," &c., *ut supra.*

(*h*) Add indemnity clause, *ut ante*, p. 234, and 282, if it be the intention of the parties.

FIDELITY OF BANKERS' CHIEF CLERK.

BOND *to secure the Fidelity of Bankers' Chief Clerk.*

Obligation from three to three.

BOND from [*clerk*], of, &c. gentleman, and [*two sureties*], of &c., jointly and severally, to [*three partners*], of &c., bankers and co-partners, in the penal sum of —— pounds, *ut ante*, p. 179.

Recital of being bankers, and agreement to take principal as chief clerk, on having bond.

WHEREAS the said [*three partners*] do now carry on the business of bankers and negociators at —— aforesaid; and they have agreed to take the said [*clerk*], as their head or managing clerk in the said business; on having the security of the above-written bond for his good conduct, with such condition as hereunder written.

Condition for faithful service:

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NOW THEREFORE THE CONDITION of the above-written obligation is such, that if the said [*clerk*] do and * shall, from time to time, while he shall continue in the service of the said [*three partners*] (*a*), as the head or managing clerk in their said banking-house, diligently and faithfully serve them, and devote the whole of his time and attention to their business; and give such reasonable attendance at their banking-house at —— aforesaid, as they shall from time to time require: AND do and shall keep all their secrets, and inform them, and every of them, of all such letters, writings, papers, and occurrences whatsoever, as shall from time to time come to his knowledge respecting the said business: AND do and shall keep all the cash accounts, ledgers, books, deeds, writings, and papers, belonging or relating to the said concern, in a proper and business-like manner; and regularly answer the letters of their correspondents: AND do and shall, from time to time, account for, and render to the said

for keeping banker's secrets, and for informing them of all letters, &c.

for keeping all cash accounts, &c. and for answering letters:

for rendering to bankers cash, &c.

(*a*) In case of the death of either of the partners, or either of them going out of the partnership, or a new partner taken in, a fresh bond should be taken. To obviate this, the variations *ante*, p. 283, should be adopted. *Vide ante*, p. 236.

obligees, and every or any of them, all such cash, bills, notes, and other securities, as shall from time to time come, or without his wilful default might have come, to his hands: AND do not nor shall embezzle, conceal, or waste; nor permit (as far as in him lies) to be embezzled, concealed, or wasted by others, any of the property belonging to the said obligees, or any of them: AND do and shall receive all the customers of the said banking-house with civility; and make up the notes or memorandums of their respective affairs when necessary: AND do and shall (as far as in him lies) cause the inferior clerk or clerks of the said obligees to give full and due attendance at their said banking-house, and there to conduct and demean himself or themselves diligently and faithfully, and in an orderly manner: AND ALSO if the said [*clerk*] do and shall, in all other respects, diligently, skilfully, and faithfully demean and conduct himself as the head or managing clerk of the said [*three partners*], in their said banking-house: Then the above-written obligation shall be void, but otherwise shall be in full force.

FIDELITY OF BANKERS' CHIEF CLERK.

for not embezzling bankers' property:

for receiving customers with civility:

for causing inferior clerks to give due attendance:

and for conducting himself in all other respects diligently.

BOND *for the Good Behaviour of a* SERVANT IN A TRADE.

FIDELITY OF SERVANT IN TRADE.

BOND from [*surety*], of &c., to [*master*], of &c., bookseller, in the penal sum of 100*l.*, *ut ante*, p. 179.

Obligation from one to one.

WHEREAS the above-named [*master*], at the instance and request of the above-named [*surety*], hath consented to take [*servant*], now residing with the said [*master*], as an hired servant in his above-mentioned business of a bookseller, to continue with him as such for so long time as they, or the executors or administrators of the said

Recital that master, at the request of surety, has agreed to take servant:

FIDELITY OF SERVANT IN TRADE.

and that surety has agreed to give bond.

[*master*], and the said [*servant*] (*a*), shall mutually agree upon; in consideration whereof the said [*surety*] hath agreed to become bound to the said [*master*] in the above-mentioned sum of one hundred pounds, as a surety for the said [*servant*] in the faithful discharge of his duty to the said [*master*] as such his servant.

Condition to indemnify master from all losses, &c. by reason of employing servant.

NOW THE CONDITION of the above-written bond or obligation is such, that if the said [*surety*], his heirs, executors, or administrators, or any of them, shall and do from time to time, and at all times hereafter, well and sufficiently save, defend, keep harmless, lossless, and indemnified, the said [*master*], his heirs, executors, and administrators, and his and their goods and chattels, lands and tenements, of, from, and against all loss, costs, charges, damages, and expenses, which may be brought upon, happen to, or be sustained by him the said [*master*],

[*289] * his heirs, executors, or administrators, by reason, or on account of the said [*master*] taking the said [*servant*] into, or employing him in his said business; or for, or by reason, or on account of any mismanagement, misusage, embezzlement, loss, neglect, default, or procurement of, from, or by the said [*servant*], in, from, out of, or to any book or books, stationery wares, money, bills, bonds, securities, or other property, effects, or things, which shall from time to time, or at any time or times, be intrusted with him the said [*servant*], by the said [*master*], his executors or administrators; or come into or under his the said [*servant*]'s hands, custody, possession, management, control, or power, in the course of business, or as the servant of the said [*master*], his executors or administrators; or otherwise howsoever; *Then* the above-written obligation to be void; otherwise to be and remain in full force and virtue.

(*a*) Surety for the fidelity of a servant to a sole trader, does not extend to a subsequent partnership. *Wright* v. *Russell*, 2 Wm. Bla. 934; 3 Wils. 530; *ante*, p. 237. If it be intended that the guaranty should extend to service under a partnership, *vide* the requisite variation, *ante*, pp 232, 281.

BY SERVANT NOT TO DISCLOSE AN INVENTION.

BOND *that neither the Obligor nor his Wife who are to be employed as Servants, in carrying on an Art invented for copying any Picture or Print, will disclose the Secrets thereof* (*a*).

Obligation from one to one.

BOND from [*servant*], of &c., to [*two obligees*], of &c., in the penalty of 3,000*l.*, *ut ante*, p. 179.

Recital of having invented an art for copying

WHEREAS the above-named [*inventor*] hath lately found out or discovered a new art, to which he hath given

(*a*) Where a bill was brought for the specific performance of an agreement, for the sale of the goodwill of a trade, and of a secret in dying, it appeared that the plaintiff had for many years carried on the trade of a dyer in Spitalfields, and had a particular mode of dying bombazeens and stuffs. None but himself and his son-in-law, one Portlock, knew the secret of dying stuffs in that mode; and this secret was esteemed of great value. In December, 1820, Bryson being about to retire from business, agreed to sell the goodwill of his trade, together with the plant and fixtures, to the defendant, for 1,500*l.*, and the exclusive benefit of the secret, for 1,000*l.* Heads of the agreement in writing were signed by both parties, and were expressed as follows:—"Heads of agreement between Mr. Bryson, of &c., and Mr. John Whitehead, of &c. Mr. Bryson possesses a secret in the art of dying bombazeens, prince's stuffs, and other goods, which is known to himself and son-in-law, Samuel Portlock, only. Mr. Bryson is about to retire from his business, and therefore he has agreed with Mr. Whitehead as follows: Mr. Whitehead is to pay him, for himself and son, 1,000*l.* for the secret, and 1,500*l.* for the plant and fixtures upon his premises, and for the goodwill of the trade, and to have the premises leased or assigned at the following rents [*then followed a description of the buildings, and the amount of the rent*]: Mr. Bryson to make the secret known to Mr. Whitehead, and instruct him in the art, and to make over the trade and goodwill, and use his endeavours to secure it to Mr. Whitehead, by circular letters, and other usual means: and he is not himself to engage in the business of a dyer for twenty years; and he is to engage that his son-in-law will not divulge the secret, or engage in the business of a dyer, for the same term as Mr.

A trader may sell a secret in his trade, and restrain himself generally from the use of it. Specific performance decreed of an agreement to sell the goodwill of a trade, and the exclusive use of a secret in dying.

BY SERVANT, NOT TO DISCLOSE AN INVENTION.

the name or title of Polyplosiasmos, by means of which he is able, not only to copy any picture or print in the colours thereof, so as to produce an exact, or nearly an exact, imitation and resemblance of the original; but to multiply, increase, or extend such copies to any given number: And which art, it is apprehended, will be found applicable to a variety of other purposes, and particularly to ornaments of various kinds, for the decoration of houses, public edifices, and other buildings: and which art, at present, promises to be capable of still further extension and improvement. And whereas the said [*inventor*] did some time since contract and agree to sell and dispose of, and did actually assign and set over to the said [*partner*], one equal undivided moiety, or half part, of the said art, and of all improvement thereof, or therein, and of all the benefit, profit, emolument, and advantage to arise

any picture or print:

which, it is apprehended, may be applied to a variety of other purposes;

that inventor has assigned one half of the art to a partner,

Bryson; and that neither of them shall do any thing to prejudice Mr. Whitehead in the trade of Mr. Bryson, and in securing and continuing the business of the connections of Mr. Bryson: and he is to procure his son-in-law to enter into an engagement to the same effect to Mr. Whitehead: an inventory of the plant to be delivered, &c.; possession to be delivered to Mr. Whitehead on payment of the 1,000*l.* and a circular immediately issued; so that the trade may be continued in the usual manner, under the direction of Mr. W., with the assistance of Mr. Bryson, who is to divulge the secret, and instruct Mr. W. therein immediately after the payment of the 1,000*l.* The 1,500*l.* to be paid upon the leases, &c. being executed according to this agreement, which are to be executed within a month, or sooner: deeds and instruments, with full and proper clauses, to be prepared and executed upon the basis of this agreement, and the expense divided." Whitehead forthwith paid the 1,000*l.* and was put into possession of the trade, and had the secret communicated to him. Bryson and his son-in-law soon afterwards executed a bond to Whitehead, in the common form, with a penalty of 2,000*l.*, reciting the agreement; and with the condition that they, or either of them, would not, for twenty years, in any manner, exercise the trade of dyers within the distance of fifty miles from Spitalfields; and would not at any time disclose the secret. Whitehead, however, thought that this bond (which was prepared by Bryson's solicitor) was not sufficiently restrictive; and that Bryson and his son might, at any time, without incurring any penalty, resume their trade at any time beyond the distance of fifty miles from London; as at Kidderminster, Norwich, or in Yorkshire, where bombazeens and stuffs are principally manufactured. For

therefrom, and from such improvement: and did also contract and agree to communicate to the said [*partner*] the secret of the said art (which he hath since done), and of all improvements that he should make therein. AND WHEREAS the said [*inventor*] and [*partner*], considering that the prosecution and exercise of the said art or invention, will be attended with considerable profits and advan- * tage to them, have contracted and agreed with each other to associate and join themselves together, for the purpose of prosecuting and exercising the same; and, in consideration of the mutual good opinion which they have of each other, have agreed to continue as such associates with each other, in the prosecuting and exercising of the said art, and the future improvement thereof, and in all things incident and belonging thereto, for the term of —— years, to commence and be computed from the —— day of —— now last past: and in the same view they have also agreed with each other to take into their said association such other persons as they shall mutually approve of, on the payment of such sums, and upon such considerations, as they shall mutually determine on in that behalf; and to enter into proper articles with each other for effectuating their said agreement; and, in the mean time, immediately to use and put into practice the

BY SERVANT, NOT TO DISCLOSE AN INVENTION.

and hath communicated to him the secret: and that they have agreed to join together to prosecute the same:

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and have agreed to continue as such associates for a term of years:

and to take other partners;

and to enter into articles for effectuating agreement: and im-

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this reason he insisted on a deed of covenant more restrictive in its terms, and with clauses for liquidated damages, in case of breach of the agreement. Disputes arose in consequence, as to the terms of the deeds to be executed under the agreement, and Bryson filed this bill for a specific performance, and for payment of the 1,500*l.*

The counsel for the defendant submitted it to the judgment of the Court, whether the agreement was of such a kind as could be carried into execution. It was the essence of the agreement, that neither Bryson nor his son-in-law should, for twenty years, carry on the trade of dyers. If, however, the agreement was to be acted on, so as to confine the restriction on exercising the trade to places within fifty miles from London, then the defendant would not have that benefit which he had stipulated for by the agreement; because the plaintiff, or his son-in-law, by removing to Norwich, or any other convenient situation beyond the distance of fifty miles, would come into direct competition with him. If considered as an agreement not to exercise the trade of a dyer any where for twenty years, it was void by the policy of law. *Mitchell* v. *Reynolds*, 1 P. Wms.

BY SERVANT, NOT TO DISCLOSE AN INVENTION.

said art or invention, for their mutual benefit, as such associates with each other. AND WHEREAS for the purpose of so practising and exercising the said art or invention, they have contracted and agreed to engage and employ as their servants or assistants, the above-bounden [*servant*], and [——] his wife, who will thereby unavoidably become * acquainted with the secret of the said art or invention, or of some part or parts thereof; and therefore, for the security and indemnity of the said [*inventor*], and [*partner*], their executors, administrators, and assigns, against the disclosure or discovery of such secret or art, or any part or parts thereof, or any thing relating thereto, by the said [*servant*] and [——] his wife, or either of them; and against their or either of their using or employing the said secret or art, for any other purpose than for the benefit of the said [*inventor*], and [*partner*], their executors, administrators, and assigns, he the said [*servant*] hath consented and agreed to enter into the above-written obligation, conditioned as hereinafter mentioned.

mediately to practise the art: that they have agreed to employ servant and [*292] his wife, as assistants, who will thereby know the secret; and therefore, for security against the discovery, and against their using the secret for any other purpose otherwise than the benefit of proprietors, servant hath agreed to give bond.

NOW THEREFORE THE CONDITION of the above-written obligation is such, that, if the said [*servant*] and [——] his wife, or either of them, shall not nor do, at any time or times hereafter, by any means whatsoever,

Condition that neither servant nor his wife shall divulge secret, without proprietors' consent;

181. If, on the other hand, it was to be acted on so as to limit the restraint on carrying on the trade to the distance of fifty miles from London, the defendant would lose the benefit for which he had contracted.

The Vice-Chancellor, Sir John Leach, said, although the policy of law will not permit a general restraint of trade, yet a trader may sell a secret of business, and restrain himself generally from using that secret. Let the Master, in settling the deed which is to give effect to this agreement, introduce a general covenant to restrain the use of the secret for twenty years; and a limited covenant, in point of locality, as to carrying on the ordinary business of a dyer; both parties being willing that the agreement should be so modified.

The decree, therefore, referred it to the Master to settle a proper deed. *Bryson* v. *Whitehead*, 1 Simons & Stuart, 74.

See further *ante*, Vol. 1, p. 172, n. (*d*); *Chesman* v. *Moseley*, 1 Bro. Cas. Par. 234; *Shackle* v. *Baker*, 14 Ves. 468; *Morris* v. *Colman*, 18 Ves. 438; *Harrison* v. *Gardner*, 2 Madd. 198; *Kennedy* v. *Lee*, 3 Meriv 441; *Job* v. *Barker*, 2 Swanst. 253; and see there, n. (*a*), 254.

either directly or indirectly, or by any intentional communication, or otherwise, insinuate, divulge, discover, or make known unto any person or persons whomsoever, without the consent of the said [*inventor*] and [*partner*], *their executors, administrators, or assigns, for that purpose, first had and obtained in writing under their respective hands, the said art or invention hereinbefore mentioned to have been discovered by the said [*inventor*] as aforesaid, or any improvement of, alteration, addition, or extension which hath already, or shall or may at any time or times hereafter be made thereof, therein, or thereto; or how, or in what manner, such art or invention, or any such improvement of, alteration in, addition to, or extension of the same art or invention, is, can, shall, or may be performed or done; or any matter or thing whatsoever relating thereto, which shall or may, directly or indirectly, lead to, or be followed by the discovery or disclosure thereof, or of any branch or particular thereof, or of the principle on which the same is performed, or whereby, or by reason or means whereof, any other person or persons shall or may be in any degree whatsoever enabled, or in anywise qualified or made capable to practise, perform or execute the said art or invention, or any improvement of, alteration in, or addition to, or extension of the same, or any other art or invention in anywise resembling the same, or the practice whereof will, can, or may in anywise interfere with or *prejudice the said [*inventor*] and [*partner*], or either of them, their, or either of their executors, administrators, or assigns, in the use or practice of the said art or invention so discovered by the said [*inventor*] as aforesaid, or any improvement, alteration, extension, or addition which shall or may at any time or times hereafter, be made thereof, therein, or thereto: AND if the said [*servant*] and [——] his wife, or either of them, shall not, nor do, at any time or times during their respective natural lives, follow, use, exercise, or practise the said art or invention, or any improvement of, alteration in, additions to, or extension of the same; or any branch or particular thereof; or any other art or invention in any wise resembling the same, or the practice thereof, which can, shall, or may, in anywise interfere with, or prejudice

BY SERVANT NOT TO DISCLOSE AN INVENTION.

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and that neither servant nor his wife shall practise the art.

BY SERVANT NOT TO DISCLOSE AN INVENTION.

the said [*inventor*] and [*partner*], or either of them, their, or either of their executors, administrators, or assigns, in the use or practice of the said art or invention so discovered by the said [*inventor*] as aforesaid, or any improvement, alteration, addition, or extension, which shall or may, at any time or times hereafter, be made thereof, therein, or thereto, for the benefit of themselves, or either of them, or for the benefit or advantage of any
[*295] other person *or persons whomsoever, either by themselves, or in co-partnership or association with any other person or persons whomsoever; *Then*, the above-written bond or obligation to be void; or otherwise shall be and remain in full force and virtue.

FOR FIDELITY AS ASSISTANT OVERSEER, COLLECTOR OF TAXES, &c.

BOND *from the Principal and Four Sureties, for the due Performance of the Offices of Assistant Overseer of the Poor* (*a*), *Collector of Taxes, &c. for the Collectors, &c. of a Parish, and Depositary of the Parish Books and Papers.*

Obligation to churchwardens and overseers,

KNOW ALL MEN BY THESE PRESENTS, *That* we [*principal*], of &c., [*surety*], of &c., [*surety*], of &c, [*surety*], of &c., and [*other surety*], of &c., are held, and firmly bound to [*churchwarden*], of

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Inhabitants in vestry may elect, and two justices may appoint assistant overseer with a salary.

† *sic.*

(*a*) By the statute 59 Geo. 3, c. 12, s. 7, it was enacted, "That it shall be lawful for the inhabitants of any parish in vestry assembled, to nominate and elect any discreet person or persons to be assistant overseer or overseers of the poor of such parish, and to determine and specify the duties to be by † or them executed and performed, and to fix such yearly salary for the execution of the said office as shall by such inhabitants in vestry be thought fit; and it shall be lawful for any two of his majesty's justices of the peace, and they are hereby empowered, by warrant under their hands and seals, to appoint any person or persons who shall be so nominated and elected to be assistant overseer or overseers of the poor,

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in trust for a parish, from five and any four, three, or two of them jointly, and each of them separately.

the parish of ——, in the said county of ——, and [*other churchwarden*], of the said parish of ——, churchwardens of the said parish of ——, and [*overseer*], of the said parish of ——, and [*other overseer*], of the said parish of ——, overseers of the poor of the said parish of ——, *In trust* for the parishioners of the said parish of ——, in the penal sum of 1,000*l.* of lawful money of Great Britain, to be paid to the said [*churchwardens and overseers*], or to their certain attorney, successors, or assigns: *For* which payment to be well and truly made, *We* bind ourselves, our heirs, executors, and administrators jointly; *And* any four (*b*) of us, separately and apart from the other of us, bind ourselves, our heirs, executors and administrators jointly; *And* any three of us, separately, and apart from the others, and other of us, bind ourselves, our heirs, executors, and administrators jointly; *And* any two of us, separately, and apart from the others, and other of us, bind ourselves, our heirs, executors, and adminis-

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Out of what money salary to be paid.

Continuance in office of such assistant overseer.

Security may be taken.

for such purposes, and with such salary as shall have been fixed by the inhabitants in vestry; and such salary shall be paid out of the money raised for the relief of the poor, at such times and in such manner as shall have been agreed upon between the inhabitants in vestry and the respective persons so to be appointed; and every person to be so appointed assistant overseer shall be and he is hereby authorized and empowered to execute all such of the duties of the office of overseer of the poor, as shall in the warrant for his appointment be expressed, in like manner, and as fully, to all intents and purposes, as the same may be executed by any ordinary overseer of the poor; and every person or persons so appointed shall continue to be an assistant overseer of the poor until he or they shall resign such office, or until his or their appointment shall be revoked by the inhabitants of the parish in vestry assembled, and no longer; and it shall be lawful for the inhabitants of any parish, upon the nomination and election by them of an assistant overseer or overseers, to require and take security for the faithful execution of his or their office, by bond, with or

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Joint severance necessary, when more than two obligors.

(*b*) Without a joint severance of the obligation, two or more obligors cannot be jointly sued in the life of another joint, or joint and several obligor, if they plead in abatement, that there is another joint obligor. *Vide ante*, p. 182, and the references there.

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trators jointly; *And* each of us, separately, and apart from the others, and other of us, bindeth himself, his heirs, executors, and administrators, severally, firmly by these presents; SEALED with our seals: DATED the —— day of ——, in the year of our Lord 18—.

Recital that the concerns of the poor are under the direction of a select vestry, pursuant to 59 Geo. 3, cap. 12:

WHEREAS the concerns of the poor of the said parish of —— are under the management and direction of a select vestry, nominated and elected pursuant to the directions contained in an act of Parliament, made and passed in the fifty-ninth year of the reign of his late Majesty King George the Third, intituled "*An act to amend the laws for the relief of the poor;*" and such select vestry consists of the above-named churchwardens and overseers, and twelve of the other principal inhabitants of the said parish of ——. AND WHEREAS, at a general vestry of the inhabitants of the said parish of ——, duly held and assembled on the —— day of —— last, pursuant to the directions contained in an act of Parliament, made and passed in the fifty-eighth year of the reign of his late Majesty King George the Third, intituled "*An act for the regulation of parish vestries,*" the said general vestry, by

that, at a general vestry, held pursuant to 58 Geo. 3, c. 69, s. 1, principal was elected assistant overseer,

by virtue of 59 Geo. 3, c. 12, s. 7:

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without a surety or sureties, and in such penalty as they shall think fit; and every such bond shall be made to the churchwardens and overseers of the poor, and may, on any breach of the condition thereof, be put in suit by and in the names of the churchwardens and overseers of the poor for the time being, by the direction of the vestry or select vestry, for the benefit of the parish, in the manner hereinafter provided."

Observations on the above precedent, as contradistinguished from decided cases.

The appointment of assistant overseer clearly is not an annual office, and therefore the liability of the sureties is not restrained to the current year, as it was held to be in the following cases. The appointment to the offices of under collector of taxes, &c. is distinguishable from the case next stated; for, in the above precedent, the sureties expressly undertake to be responsible beyond the current year; but, independently of that circumstance, the under collector is to remain in his office until he is removed, or resigns, whereas in the following case the collector was re-appointed in the ensuing year.

Sureties for an annual parish

Thus, where A., B., and C., entered into a bond as sureties for D. and E., the condition of which bond recited that D. was on such a day ap-

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virtue of the said act of the fifty-ninth year of his said late Majesty, nominated and elected the said [*principal*], to be assistant overseer of the said parish of ——: *And* did specify and determine, that he was so nominated and elected, in order to execute and perform the duties of collecting the poor rates of the said parish of ——; and also such sums of money as were then, or might thereafter become, due to the churchwardens and overseers of the poor of the same parish, from the mothers and reputed fathers of bastard children born in the same parish; and also such sums of money as were then, or might thereafter become, payable to the churchwardens and overseers of the poor of the same parish, for monies advanced by them, for or towards the support of the poor belonging to any other parish, township, or place, who resided, or might reside, within the said parish of ——; and also such other sums of money as were then, or might thereafter become, due and payable to the churchwardens and overseers of the poor of the same parish, on any other account whatsoever. AND *it was*, at the said general vestry, *Resolved*, that the salary to be paid to the said [*principal*], for the execution of his said office, should be fixed at the yearly sum of—— pounds: *And* that the said [*principal*] should continue to

and the vestry specified, that he was so elected, in order to execute the duties of collecting the poor rates, &c.;

and the vestry resolved that his yearly salary should be £—

that he should be assistant over-

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pointed collector of the church-rate of the parish of S. S. by virtue of which office he was empowered to collect and receive all such monies as were rated and assessed on the inhabitants by virtue of the said rate, and for which he was accountable to the wardens of the grand account, and bound the sureties for D.'s duly accounting for all monies collected or received by him, on account of the above rate; as also on all and every other rate or rates thereafter to be made and collected by him the said D.: the Court held, that the sureties were only answerable for D. in that single appointment, and not on his appointment in the ensuing year. *The Wardens of Saint Saviour's Southwark* v. *Bostock*, 2 Bos. & Pull. 175. *Vide ante*, p. 235, 239; *Lord Arlington* v. *Merricke*, 2 Saund. 411; *Liverpool Waterworks Company* v. *Atkinson*, 6 East, 507; 2 Smith, 654, *S. C.*

officer are not answerable for his deficiencies under a second appointment, without special words clearly expressing a more extensive liability.

So, where the principal is appointed to an annual parish office, his sureties are not answerable beyond the year, without special words clearly expressing a more extensive liability. Thus, where a bond was made by the defendant's testator, as surety for E., with a condition, reciting that E. had been, and still was, collector of the land-tax, and all other taxes and duties imposed by several acts of Parliament on the inhabitants of the

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seer until he resigned, or his appointment revoked: that he should procure four sureties, who should, with himself, become bound for the faithful execution of his office. And the vestry resolved that he should be appointed collector of the highway assessment, church rate, assessed and land-tax, &c.

be an assistant overseer of the poor of the said parish of ——, until he should resign such office, or until his appointment should be revoked by the inhabitants of the said parish of ——, in vestry assembled, and no longer: *And* that the said [*principal*] should procure four sufficient sureties, to the satisfaction of the said churchwardens and overseers of the poor; which said sureties should, with the said [*principal*], become bound in a bond to the churchwardens and overseers of the poor of the said parish of ——, in the penal sum of 1,000*l.* for the faithful execution of his said office. And *it was*, at the said general vestry, *also Resolved*, that the said [*principal*] should also become and be appointed collector of the assessments for the repairs of the highways in the said parish of ——, and such other sums of money as might become due and payable to the surveyors of the highways for the time being, within the same parish; and also collector of the church rates of the said parish of ——; and such other sums of money as might become due and payable to the churchwardens for the time being of the same parish; and also collector of the assessed taxes, and land-tax, within the said parish of ——; and such other sum or sums of money as might become due and payable to, or be required

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parish of C., by means whereof he received from the inhabitants divers sums of money, and conditioned for the due payment by E. from time to time, and at all times thereafter, to the receiver-general of taxes, &c.; all and every sum which he (E.) should from time to time collect and receive from the inhabitants of the parish, for or on account of any tax or taxes then imposed, or which should or might thereafter be imposed on them by any act of Parliament; it was held to be confined to the current year for which E. was, at the date of the bond, collector; although it did not appear on the condition, that he was only appointed for a year, it being shewn by the defendant's plea, that the said office of collector was an annual office, and held as such by E. at the date of the bond, although, by the replication, it appeared that E. held the office, not only for that year, but from thence to the time of exhibiting plaintiff's bill. *Hassell* v. *Long*, 2 Maule & Selw. 363. In which case, Lord *Ellenborough*, in delivering the judgment of the Court, said, " The question for the opinion of the Court is, whether, under the condition of this bond, the defendant's testator, as surety for E., was liable for the arrears of monies received by E., as such collector or receiver, in any year subsequent to the year which expired in

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to be collected by, the collectors for the time being of the assessed taxes within the same parish. *And it was*, at the said general vestry, *also Resolved*, that the said [*principal*] should from time to time pay all such sums of money as he should collect, as such receiver as aforesaid, at the end of every —— days from the time of receiving the same, into the hands of such banker or bankers, as a quorum of the select vestry of the said parish of —— should from time to time appoint, to the credit of the respective persons or officers, for whose use, or on whose account, the same monies should respectively be collected: that is to say; the collections for the overseers of the poor, to their credit; the collections for the surveyors of the highways, to their credit; the collections for the churchwardens, to their credit; the collections on account of the assessed taxes, to the credit of the collectors thereof: the collections on account of the land-tax, to the credit of the collectors thereof; and the collections on any other account, to the credit of a separate account, or of separate accounts: *And also*, that the said [*principal*] should, from time to time, deliver unto the churchwardens and overseers of the poor of the said parish of —— for the time being, within seven days after being required so to do, by a

that he should pay all money he should collect into such bank as a *quorum* of the select vestry should appoint, to the credit of the respective officers on whose account the same should respectively be collected:

that he should deliver to the churchwardens and overseers, after request, accounts of all

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1797; in the course of which, *viz.* on the 5th of December, 1796, this bond was given. The recital, which is a proper key to its meaning, states that E. had been for some time, and then was collector and receiver of the land-tax, &c., (that being an annual tax, and E., as a receiver, being an annual officer,) by means whereof, that is, of being then collector and receiver of those duties, the said E. received and collected, that is, then received and collected, divers sums. It is to be observed, that in this recital not one word occurs, describing an act, or intimating a receipt, beyond the limits of the then current year of collection. The words alone from which an inference is to be collected, are to be found in the condition, *viz.* "all and every sum of money which he, the said J. E., should or might, from time to time, receive from the inhabitants of C., on account of any taxes then imposed, or *which should or might thereafter be imposed* on them by any act of Parliament." Here is an express mention of duties *thereafter* to be imposed; which shews (as it is contended for the plaintiffs,) that the surety meant to continue his responsibility beyond the period of the current year; inasmuch as it could not be supposed probable that any duties would be imposed, so as to come into collection, between the

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quorum of the select vestry of the same parish for the time being, accounts in writing of all monies collected and received by him, the said [*principal*], for the use, or on account of the churchwardens and overseers of the poor, the surveyors of the highways, the churchwardens, and the collectors of the assessed taxes and the land-tax of the said parish of ——, respectively, and also on any other account whatsoever, by virtue of his said appointment; *And* should pay the balance (if any) remaining in the hands of the said [*principal*], on each of the said accounts, unto such banker or bankers as aforesaid, within the space of three days then next following, to the credit of the respective persons for whose use, or on whose account, the same monies should have been collected. AND, at the said general vestry, *it was*, by virtue of the said act passed in the fifty-eighth year of the reign of his said late Majesty, *Resolved and directed*, that, as well the books by the same act directed to be provided and kept for the entry of the proceedings of vestries, as all former vestry-books, and all rates and assessments, accounts and vouchers, of the churchwardens, overseers of the poor, and surveyors of the highways, and other parish officers, and all certificates, orders of court and of justices, and other parish

monies collected by him on account of the respective officers;

and pay the balance into the bank.

And by virtue of the 58 Geo. 3, c. 69, s. 6, the vestry resolved, that books, rates, &c., should be kept by assistant overseer in the vestry-room;

5th of December and the 5th of April following. On the construction of this part of the condition, the whole question turns. Assuming it to be improbable, that taxes should be imposed between the times above stated, still it was not impossible; and the words might have been introduced *ex abundanti cautelâ;* and certainly they do not necessarily import that the duties should be collected by him after the expiration of the current year. And the words of the recital, which afford the best ground for gathering the meaning of the parties, do not advert to any such collection. Besides, as the consequence of giving to the condition a more enlarged construction, so as to extend the responsibility beyond the current year, would be of so grievous and burdensome a nature, we think it requires more clear and certain words than are to be found in this instrument. If the bond may continue beyond the current year, it may do so for the life of the collector, during the whole period of his remaining in office; it will attach on the surety whenever the person for whom he undertakes is in default; and we know of no means subsisting at common law, by which the surety can redeem himself from this interminable risk. All the cases from Lord *Arlington* v. *Merricke*, to the last case of *St. Saviour's* v. *Bos-*

books, documents, writings, and public papers of the said parish of —— (except the registry of marriages, baptisms, and burials), should be kept by the said [*principal*], and deposited in the vestry room of the said parish of ——, or in such other place or places, as by a quorum of the select vestry, for the time being, of the same parish, should from time to time be directed. AND *it was*, at the said general vestry, *also Resolved*, that the condition on which the said [*principal*] should be appointed to his said offices and employments, should be, that he should execute the duties thereof faithfully and assiduously; and not engage in any other business or employment whatsoever; nor resign his said offices or employments, or any of them, without giving one calendar month's previous notice, in writing, to the churchwardens and overseers of the poor of the said parish of —— of his intention so to do: *And* that the persons who should become sureties for the due execution and performance of the office of assistant overseer of the same parish by him the said [*principal*], should also become sureties for his faithfully performing and executing the other offices and employments hereinbefore mentioned. AND WHEREAS the said [*principal*] hath accepted the said offices or employ-

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or in such other place as by quorum of select vestry should be directed.

And that the condition on which he was appointed to his offices was, that he should execute the duties faithfully, &c.

Recital that principal hath accepted, and

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tock, in 2 N. Rep. 175, have narrowed the construction of conditions of this sort, to the actual term of the office. The difference to be found in the words of the condition in this case, is not, we think, such as will warrant us, in fair construction, to extend the limits of this responsibility beyond those of the former cases. In conformity with those cases, we are of opinion, therefore, that the condition of this bond does not extend the responsibility of the surety for the receiver, beyond the current year of his office."

[And where the office of a principal is annual, that of his deputy will be annual also; and therefore a bond given for the due execution of the office, will be confined to the current year: and the circumstance of its being to account to the principals, *and their successors*, will not vary the construction, as it will be considered as meaning that the account shall be rendered to the successors in office, for monies accruing, but not accounted for, within the year. *Leadley* v. *Evans*, 9 J. B. Moore, 102.]

Bond to account to A. and B. *and their successors*, how construed.

A bond with one surety only, taken by commissioners of taxes under the 43d Geo. 3, c. 99, s. 13, is not therefore void; the office of collector, under that act of Parliament, is an annual office, and therefore, where a bond,

The condition of a bond being larger than the recital, the reci-

agreed to execute offices, in consideration of salary as asssistant overseer, and of being allowed the poundage paid to collectors of assessed and land-tax:

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that sureties have agreed to join in bond, as his sureties; and churchwardens and overseers have accepted them as sufficient sureties;

ments, and hath agreed to execute and perform the duties thereof, in consideration of the said salary of —— pounds, as assistant overseer of the poor, and also in consideration of being allowed to retain, and take for his own * use and benefit, the poundage or per centage allowed to collectors of assessed taxes and land-tax. And whereas the above-bounden [*four sureties*] have agreed to join with the said [*principal*] in the above-written bond or obligation, subject to the conditions hereunder written, as the sureties of the said [*principal*], for his due and punctual observance of the duties of his said offices or employments; and for his making such payments, and doing and performing such other acts and things, during his continuance in the said offices or employments, not only during the current year, but also in every and all future year and years, as are hereinafter mentioned. And the above-named churchwardens and overseers of the poor have accepted the said [*four sureties*], as sufficient sureties for the said [*principal*], pursuant to the resolutions of the said general vestry. And whereas, by a warrant under the hands and seals of —— and ——, two of his Majesty's justices of the peace for the said county of ——, bearing date on or about the —— day of

that magistrates, by their warrant, have appointed principal to be assistant overseer.

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tal shall restrain it.

after reciting the appointment of H. W. to be collector under that act, was conditioned for the due collection by H. W. of the rates and duties at all times thereafter; it was held, that the due collection of the rates for one year was a compliance with the condition of the bond: and, although it appeared from the condition of the bond, that H. W. and G. P. were both appointed collectors, it was held that such bond, being for the due collection by H. W. only, might be put in suit against the surety, without first selling the goods of G. P. *Peppin* v. *Cooper*, 2 Barnw. & Ald. 431.

Where the parish office is not annual, and the words of the bond are general, the sureties' liability is not confined to the current year.

The circumstances of the above precedent appear to be very much like the following case, where, in debt on bond, made by C. and his sureties, with a condition, reciting stat. 27 Geo. 2, c. 38, intituled, "An act for the better relief and employment of the poor of the parish of Saint Nicholas, Deptford, and Saint Paul, Deptford, and for repairing the highways," &c. the churchwardens and parishioners of the respective parishes were, in manner therein mentioned, directed to choose and appoint one or more fit person or persons to be collector or collectors of the rates to be assessed, raised, and levied, by virtue of the said act, in each parish; and that the said churchwardens and parishioners of the respective parishes were there-

—— 18—, they the said —— and —— have by virtue and in pursuance of the said act passed in the fifty-ninth year of the reign of his said late Majesty, appointed the said [*principal*] to be assistant overseer of the poor of the said parish of ——, for the pur- * poses, and with such salary, as are first hereinbefore mentioned.

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NOW THEREFORE THE CONDITION of the above-written bond or obligation is such, that, if the said [*principal*] should, from time to time, and at all times hereafter, during his continuance in the said offices, or employments, not only during the current year, but also during every and all future year and years, well, truly, and duly execute and perform the duties of collecting the poor rates, highway rates, assessed taxes, and land-tax of the said parish of ——, and such other sum and sums of money as aforesaid: AND if the said [*principal*] should, from time to time, and at all times hereafter, well, truly, and duly pay, or cause to be paid, all such sums of money as he shall collect, as such receiver as aforesaid, at the end of every —— days from the time of receiving the same, into the hands of such banker or bankers as a quorum of the select vestry of the said parish of ——, shall

Condition, that principal, while in his offices, duly collect the poor rates, &c.,

and duly pay the money he shall collect into such bank as quorum of select vestry shall appoint, to the credit of the respective officers:

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by required to take such security of such collector or collectors so by them appointed, for the faithful accounting for all such monies as he or they should receive by virtue of his or their office, as to the said churchwardens and parishioners of the respective parishes, or the major part of them, so assembled, should appear a sufficient security for the monies to be received by the said collector or collectors, from time to time; and also reciting, that C. (four years before the date of the bond) was appointed by the churchwardens and parishioners of D., in pursuance of the statute, collector of the poor rates *to be levied and raised* in the parish; and conditioned that C. should account, as often as required, for all monies *so collected and received by him, by virtue of the act, &c.* Breach for not accounting for monies collected and received since the making of the bond, &c. Plea, that C. accounted for all the monies collected and received by him before the making of the bond: secondly, that the office of collector is an annual office, and that C. accounted for all the monies collected and received by him within the current year of office in which the bond was made; but, upon demurrer, it was held, that both pleas were ill, for, by the words of the statute, the appointment is prospective, to

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from time to time appoint, to the credit of the respective persons or officers, for whose use, or on whose account, the same monies shall respectively be collected in manner aforesaid: And also, if the said [*principal*] should, from time to time, and at all times hereafter, deliver unto the churchwardens and overseers of the poor of the said parish *of ——, for the time being, within seven days after being required so to do by a quorum of the select vestry of the same parish for the time being, an account in writing of all monies collected and received by him, the said [*principal*], for the use, or on account of the churchwardens and overseers of the poor, the surveyors of the highways, the churchwardens, and the collectors of the assessed taxes, and the land-tax of the said parish of——, respectively, and also on any other account whatsoever, by virtue of his said appointment (*x*): *And* should pay the balance (if any) remaining in the hands of the said [*principal*], on each of the said accounts unto such banker or bankers as aforesaid, within the space of three days then next following, to the credit of the respective persons for whose use, or on whose account, the same monies shall have been collected: And also if the said [*principal*] should well and truly keep and preserve every book, rate, assessment, account, voucher, certificate, order, document, writing, or paper, delivered into his hands or custody by virtue of his said appointment, under the said act passed in the fifty-eighth year of the reign of his said late Majesty; *And* should not wilfully, or negligently, destroy, obliterate, or injure the same, or suffer the same to be destroyed, obliterated, or injured; *And* should not,

and deliver to churchwardens and overseers on request by *quorum* of select vestry, an account of all monies received by him for the poor, &c.

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and pay the balance on each of the accounts into bank, to the credit of the respective officers:

and keep and preserve every book, rate, &c., delivered to his custody, and not wilfully destroy, &c. same;

and not after

collect future rates, and not retrospective only, and the condition is in the words of the statute, without any restraining words; and it is not pleaded that the office was an annual office at the time of making the bond, and, if it had been, yet it appears by the statute not to be an annual office, though concerning rates which are raised in the course of a year. *Curling* v. *Chalklen*, 3 Maule & Selw. 502.

[(*x*) A bond conditioned to be void if an overseer should account for monies received by him by *virtue of his office*, was lately held not to extend to a sum of money borrowed by him without any express direction from the parishioners, an overseer having no authority to borrow money. *Leigh* v. *Taylor*, 7 Barn. & Cress. 491.]

FOR FIDELITY AS ASSISTANT OVERSEER, COLLECTOR OF TAXES, &c.

notice and demand neglect to deliver same; and while in offices, faithfully execute the duties thereof; and not engage in any other business; and not resign his office without giving notice.

after reasonable notice and demand, refuse or neglect to deliver the same to such person or persons, or to deposit the same in such place as shall by the order of any general vestry of the said parish of —— be directed: And if the said [*principal*] should, from time to time, and at all times hereafter, during his continuance in the said offices and employments, well, truly, and duly, faithfully, and assiduously execute the duties thereof; and not engage in any other business or employment whatsoever; *And* should not resign his said offices or employments, or any of them, without giving one calendar month's previous notice in writing, to the churchwardens and overseers of the poor of the said parish of ——, of his intention so to do; *Then* the above-written bond or obligation shall be void, and of no effect; but otherwise shall be and remain in full force and virtue.

Sealed and delivered, (by the above-named [*principal*] and [*sureties*], in the presence of us

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FROM TRUSTEES OF ASSURANCE SOCIETY.

BOND *from Three Trustees of an Assurance* (*a*) *Society, to the Treasurer, for duly applying the Funds of the Society, according to the Directions of the Court of Directors;* And *to permit Suits or Actions to be brought in their Names, for Monies due to them, as Trustees for the Society, without becoming Nonsuit, &c.*

Obligation from three to one, jointly and severally.

BOND from [*three trustees*], of &c., to [*treasurer*], of &c., in the sum of six thousand pounds, jointly and severally, *ut ante*, p. 179.

Recital that an assurance society is establish-

WHEREAS a society is now subsisting, commonly called or known by the name of the —— Assurance Society;

(*a*) The above form is equally applicable where the trustees are for any other society, company, or extensive co-partnership.

The above form is applicable to other purposes.

FROM TRUSTEES OF ASSURANCE SOCIETY.

and which society was established under, and by virtue, and in manner, and subject to the regulations mentioned in a certain deed, bearing date the —— of —— 17—, and inrolled in his Majesty's Court of King's Bench: *And* which said society doth now continue to be conducted under and by virtue of the same deed, and the rules and regulations therein mentioned, and such other rules and regulations as have been made and agreed upon by the members thereof. AND WHEREAS the above-bounden [*three trustees*] have been elected and chosen three of the trustees for the said society, pursuant to, and in the manner prescribed by, the said deed inrolled, and the bye-laws, rules, orders, and regulations of the same society. AND WHEREAS the said [*three trustees*] have agreed to enter into a bond or obligation to the said [*treasurer*], who hath been appointed the treasurer to the said society, for the due application of the money which may come to their hands, as such trustees as aforesaid; and for permitting actions to be commenced and prosecuted in their, or in any of their names, for the recovery of any sum or sums of money due or owing to them, or any of * them, as trustees for, and on behalf of the said society; and for other the purposes mentioned in the condition hereinafter contained.

ed, and conducted under the regulations of a deed, and rules made by the members:

that the obligors have been elected trustees for the society:

that the trustees have agreed to give a bond for fidelity in their office:

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Condition to sell out stock standing in their names, in trust for the society, when required by the directors:

NOW THE CONDITION of the above-written obligation is such, that, if the above-bounden [*three trustees*] shall and do, at all and every times or time hereafter, when called upon, demanded, or required by the Court of Directors of the aforesaid —— Assurance Society, for the time being, appointed and called together, pursuant to the rules and regulations of the same society; or by any order of the said Court of Directors, or the major part of them, assembled at any of their general or extra meetings, held pursuant to the rules and regulations of the said society, sell out, and dispose of, all or such part of such stock or stocks of money or monies as they, and each or either of them, jointly or severally, may be intrusted with for the use and benefit of the said society, as may at that time stand in their names, or in either or any of their names, jointly or severally, in any of the public funds, in the Bank of

FROM TRUSTEES OF ASSURANCE SOCIETY.

England, East India stock, South-Sea stock, or otherwise, in trust for the said society: And shall and do well and truly pay the money or monies arising from so disposing of, or selling out of, all or such part of such stock or stocks, money or monies, so intrusted with them, or each or either of them, jointly or severally, for the use and benefit of the said society, to such person or persons, and in such manner and form as they the said court of directors, or the major part of them, assembled at any of their general or extra meetings as aforesaid, may order and direct: Or shall and do, at all and every times and time hereafter, when called upon, demanded, or required, by the said court of directors of the said society for the time being, or when by any order of the said court of directors, or the major part of them, assembled at any of their said general or extra meetings, transfer and set over all and singular such stock or stocks, money or monies, as they, or each, or either, or any of them, may jointly or severally hold in trust for the said society, in any of the public funds, in the Bank of England, East India stock, South-Sea Stock, or otherwise, to such person or persons as they the said court of directors *for the time being, or the major part of them, assembled as aforesaid, shall and may order and direct; Or shall transfer and set over to such person or persons, such part or parts of such stock or stocks, money or monies, as they the said court of directors for the time being, assembled as aforesaid, shall or may order and direct: And shall and do also, at all and every times and time hereafter, when ordered, demanded, or required by the said court of directors of the said society for the time being, or the major part of them, assembled at any of their general or extra meetings, deliver up, transfer, and set over, all and singular such deeds, bonds, bills, notes, or other papers or writings, as they, or each, or any of them, may jointly or severally hold in trust for, or for the benefit of, the said society, to such person or persons as they the said court of directors for the time being, or the major part of them, as aforesaid, shall appoint to receive the same: And shall and do, at all and every times and time hereafter, when so ordered, demanded, or required, as aforesaid, and at the costs and charges in the law of the said society, seal and

to pay the money arising therefrom, as directors shall order:

or, when required, transfer stock held by them in trust for the society, as directors shall order;

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or transfer such part of such stock as they shall order:

to deliver, and transfer all such deeds, bonds, &c., held in trust for the society as the directors shall appoint:

and when so ordered, to assign all such deeds, bonds, &c., as directors shall appoint;

FROM TRUSTEES OF ASSURANCE SOCIETY.

execute such good and sufficient assignment or assignments in the law, of all and singular such deeds, bonds, bills, notes, or other papers or writings, and of all such other the premises relating thereto; *And* of all their right, title, benefit, and interest therein, and of the premises any ways relating thereto, to such person or persons as they, the said court of directors for the time being, or the major part of them, as aforesaid, shall appoint, freed and discharged of and from all incumbrances done or committed by them, or any or either of them, without the order or direction of the said court of directors for the time being, or the major part of them, as aforesaid, in such manner and form, and by such deed or deeds, assignment or assignments, as by the said court of directors for the time being, or the major part of them, as aforesaid, or their counsel learned in the law, shall be reasonably devised, advised, or required: And shall also well, truly, and faithfully, at all and every times or time hereafter, pay into the hands of the then treasurer of the said society for the time being, all and every the dividends, interest, and profits, of such money or monies as shall by them be placed out at interest in any of the public *funds, in the Bank of England, East India Stock, South-Sea Stock, or any other security or securities whatsoever, in trust for the said society, as the same shall arise and become due, or shall come to the hands of them, the said [*three trustees*], or to any or either of them, jointly or severally, for the use and benefit of the said society: And also shall and do permit and suffer any suit or action, or suits or actions, which may be directed in manner aforesaid, at any such general or extra meeting as aforesaid, to be brought, commenced, and prosecuted, in their or any of their names, for the recovery of any sum or sums of money which shall or may be due or owing to them, or any of them, as trustees for the said society, without becoming nonsuit therein, or otherwise delaying, releasing, compounding, or barring the same; *Then* the above-written obligation to be void, and of no effect; but otherwise the same shall be and remain in full force and virtue.

to pay treasurer all dividends, &c., as they shall be received:

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and to permit suits or actions to be brought in their names for monies due to them as trustees for the society, without becoming nonsuit, &c.

FROM TREASURER OF ASSURANCE SOCIETY.

BOND *from the Treasurer of an Assurance Society, to the Trustees, for duly applying the Monies of the Society which shall come to his Hands;* AND *to permit Suits or Actions to be brought in his Name, for Monies due to him as Treasurer, without becoming Nonsuit, &c.;* AND *to observe the Rules and Regulations of the Society, which he ought to perform as Treasurer.*

Obligation from one to twelve, as joint tenants.

BOND from [*treasurer*], of &c., to [*the whole body of trustees, describing each*], of &c., in the penalty of 2,000*l.*, *ut ante*, p. 179.

Recital.

WHEREAS (*recite as in the preceding bond, mutatis mutandis*).

Condition to apply sums received as treasurer, according to the rules of the society:

NOW THE CONDITION of the above-written obligation is such, that if the said [*treasurer*] shall and do, from time to time, and at all times hereafter, pay, and apply all such sum and sums of money as shall be received *by him, as such treasurer as aforesaid, in the manner mentioned and prescribed by the said deed, and by such subsequent rules, orders, and regulations, as have been, or shall or may hereafter be made, by the court of directors of the aforesaid —— Assurance Society, for the time being, or the major part of them, when assembled at any of their general or extra meetings, held pursuant to the rules and regulations of the said society: AND shall and do also, at all and every times and time hereafter, when ordered, demanded, or required by the said court of directors of the said society for the time being, or the major part of them, assembled at any of their general or extra meetings, deliver up, transfer, and set over, all and singular such deeds, bonds, bills, notes, or other papers or writings, as

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when ordered by the directors, to deliver and transfer such deeds, bonds, &c., as he shall hold as treasurer:

FROM TREASURER OF ASSURANCE SOCIETY.

he the said [*treasurer*] may hold in trust for, or for the benefit of, the said society, to such person or persons, as the said Court of Directors for the time being, or the major part of them as aforesaid, shall appoint to receive the same: AND shall and do, at all and every times and time hereafter, when so ordered, demanded, or required as aforesaid, and at the costs and charges in the law of the said society, seal and execute such good and sufficient assignment or assignments in the law, of all and singular such deeds, bonds, bills, notes, or other papers or writings made to, or taken in the name of, the said [*treasurer*], in trust for, or for the benefit of the said society; *And* of all such premises as relate thereto; *And* of all his right, title, benefit, and interest therein, and of the premises in any wise relating thereto, to such person or persons, as they, the said court of directors for the time being, or the major part of them as aforesaid, shall appoint, freed, and discharged of, from, and against all incumbrances, done or committed by him without the order or direction of the said court of directors for the time being, or the major part of them, as aforesaid, in such manner and form, and by such deed or deeds, assignment or assignments, as by the said court of directors for the time being, or the major part of them, as aforesaid, or their counsel learned in the law, shall be reasonably devised, or advised, or required: AND ALSO, if the said [*treasurer*], his heirs, executors, or administrators, shall and do permit and suffer *any suit or action, or suits or actions, which may be directed in manner aforesaid at any such general or extra meeting as aforesaid to be brought, commenced, and prosecuted in his, their, or either of their name or names, for the recovery of any sum or sums of money which shall or may be due or owing to the said [*treasurer*], as treasurer of the said society, or his heirs, executors or administrators; or for any other cause, matter, or thing whatsoever, in anywise relating to the affairs of the said society, without becoming nonsuit therein, or otherwise delaying, releasing, compounding, or barring the same: AND shall and do, from time to time, and at all times hereafter, well and truly observe, perform, fulfil, and keep, all and singular the rules and regulations mentioned and contained in

and when so ordered, to execute assignments of such deeds, bonds, &c.

to permit suits or actions to be brought in the names of treasurer, his heirs, &c. without becoming nonsuit, &c.

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and to perform all the regulations of the society, which he ought to perform as treasurer.

the said deed, so enrolled as aforesaid, so far as the same remain unaltered; And all such other rules, orders, and regulations, which have since been made, or which shall or may, from time to time hereafter, be made by the same society, and which it is, or shall or may be, incumbent upon him to perform, as treasurer of the said society; *Then* the above-written obligation to be void; but otherwise the same shall be and remain in full force and virtue.

FROM TREASURER OF ASSURANCE SOCIETY.

BOND *by a Tenant for Life, who had Power to lease only for Twelve Years, but who had contracted* TO GRANT A LEASE *for Twenty-one Years, that, at the end of Twelve Years, for which a Lease had been granted, the immediate Reversioner should upon the Lessee's Request, grant another Lease for Nine Years, at the same Rent, and under the same Covenants, as was contained in the Lease for Twelve Years.*

TO GRANT A LEASE.

BOND from [*lessor*], of &c., to [*lessee*], of &c., in the penal sum of —— pounds, *ut ante*, p. 179.

Obligation from one to one.

WHEREAS the above-bounden [*lessor*], lately contracted and agreed with the above-named [*lessee*], to grant him a *lease of *All that* farm house, messuages, lands, and hereditaments, situate in the parish of —— in the said county of —— and commonly called the —— farm, with the appurtenances, for the term of twenty-one years, from the eleventh day of October last, at the yearly rent of —— pounds; but by the will of [*testator*], late of &c., deceased, under which the said [*lessor*] derives his title to the said premises, a lease thereof granted by him, for a longer term than twelve years, would determine by his death: *And* therefore, he hath, by an indenture bearing even date

Recital of contract to grant lease of farm for 21 years:

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but a lease for more than 12 years would determine on lessor's death:

demise for 12 years:

TO GRANT A LEASE.

with the above-written obligation, demised the said premises to the said [*lessee*], for the term of twelve years, from the said eleventh day of October; *And* hath agreed, that if, at the expiration of that term, the person or persons then entitled to the immediate reversion of the said premises, shall not, upon the request of the said [*lessee*], his executors or administrators, grant to him or them another lease of the said premises, for a further term of nine years from the expiration of the lease already granted thereof, as aforesaid; and at the same rent, and under the same covenants, as are contained in that lease, then the said [*lessor*], his executors or administrators, shall or will forthwith pay to the said [*lessee*], his executors or administrators, the sum of —— pounds, as liquidated damages, for the loss of the residue of the term of twenty-one years in the said premises originally contracted for, as aforesaid.

and agreement that if, at expiration, reversioner should not, on lessee's request, grant another lease for nine years, under same rent and covenants, then lessor to pay liquidated damages.

NOW THEREFORE THE CONDITION of the said obligation is such, *That*, in case, at the expiration of the lease already granted of the said premises, as aforesaid, the person or persons who shall then be entitled to the immediate reversion thereof, shall not, upon the request of the said [*lessee*], his executors or administrators, grant to him or them another lease of the said premises, for the said further term of nine years, at the rent, and under the covenants aforesaid, then, if the said [*lessor*], his executors or administrators, shall, upon demand, pay to the said [*lessee*], his executors or administrators, the said sum of —— pounds, the said obligation shall thereupon become and be void; but otherwise, shall remain in full force.

Condition that reversioner shall grant lease accordingly.

BOND *to the Purchaser of an Infant's Estate in Fee* (*a*), *that if the Infant, or his Heirs, should, for Six Months after being capable, refuse to make a good Title, and execute a proper Conveyance, then Obligees will repay the Purchaser a Sum paid in part of the Purchase Money, with Interest, and a further Sum, by way of Liquidated Damages.*

ON SALE OF INFANT'S ESTATE, TO REFUND, PAY INTEREST, AND LIQUIDATED DAMAGES, IF INFANT SHOULD REFUSE TO CONVEY.

KNOW ALL MEN, BY THESE PRESENTS, *That We* [*vendor*], of &c., esquire, and [*other vendor*], of &c., widow, are held and firmly bound to [*purchaser*], of &c., in the sum of 8,000*l.* of lawful money of Great Britain; to be paid to the said [*purchaser*], or his certain attorney, executors, administrators, or assigns: *For* the true payment whereof we bind ourselves, and each of us by himself and herself, for the whole and every part thereof, our, and each of our heirs, executors, and administrators, and every of them, jointly and severally, firmly by these presents; *Sealed* with our seals: DATED the —— day of ——, 18—.

Obligation, two to one, jointly and severally.

WHEREAS by articles of agreement (*recite the agreement*, Vol. 1, p. 94, *very fully to the end.*) AND WHEREAS in pursuance of the said recited articles of agreement, the said [*assignee of mortgagee*] did, on the tenth day of this present month of October, execute an assignment of the said mortgage term of two thousand years, and of the said sum of 2,800*l.* thereby secured as aforesaid, unto the said [*purchaser*]; and the said [*purchaser*] did, on the said tenth day of this same month of October, pay unto the said [*assignee of mortgagee*] the said sum of 2,800*l.*, as

Recital of contract.

Recital of assignment of mortgage term and mortgage money to purchaser;

payment by purchaser of mortgage money:

(*a*) See the Agreement, Vol. 1, p. 91.

and his payment of part of purchase money to vendors:

the consideration of such assignment; and did pay unto the said [*vendor*], and [*other vendor*], the said sum of 200*l.*, in part of the said purchase money of 6,000*l.* as aforesaid. AND WHEREAS it hath been agreed, between the said [*two vendors*] and [*purchaser*], that the said [*two vendors*] should execute unto the said [*purchaser*], a bond, in a sufficient penalty, for securing to him the payment of the said sums of 200*l.* and 4,000*l.*, pursuant to the said recited * articles of agreement, in the event of such refusal or neglect by the said [*infant*], the infant, or his heir or heirs-at-law, as hereinafter mentioned: AND, in pursuance of the said agreement, the said [*two vendors*] have executed the above-written bond; with such condition for making the same void as hereinafter is mentioned.

agreement that vendors should execute a bond to purchaser, for securing payment of sum paid them, and liquidated damages, if infant or his heirs should refuse to convey.

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Condition that, if infant or his heirs should, for six months after being capable, refuse to make a good title, and execute conveyance;

NOW THE CONDITION of the above-written obligation is such, that, if the said [*infant*], the infant, for the space of six calendar months next after he shall attain the age of twenty-one years, or (in case of his death in the mean time) if the heir or heirs-at-law of the said [*infant*], the infant, for the space of six calendar months next after he, she, or they, shall be capable by law to make and execute a conveyance of freehold hereditaments, shall refuse or neglect to make out a good title to, and execute a proper conveyance of, the said messuages, lands, and hereditaments, and the inheritance thereof, in fee simple, unto the said [*purchaser*], his heirs or assigns, such conveyance being prepared and tendered for execution by and at the expense of the said [*purchaser*], his heirs, or assigns; *Then*, and in either of the said cases, if they, the said [*two vendors*], or one of them, their, or one of their heirs, executors, or administrators, shall, immediately after such refusal or neglect, as aforesaid, well and truly repay, or cause to be repaid, unto the said [*purchaser*], his executors, administrators, or assigns, the said sum of 200*l.* of lawful money of Great Britain, so advanced and paid by the said [*purchaser*], as aforesaid; together with interest for the same, after the rate of five pounds *per centum per annum*, to be computed from the said tenth day of this present month of October, to the day on which the repayment of the said sum of 200*l.* shall be actually made: AND

then, if obligees should repay purchaser sum paid in part of purchase money,

with interest;

ALSO shall and do, immediately after such refusal or neglect, well and truly pay, or cause to be paid, unto the said [*purchaser*], his executors, administrators, or assigns, the further sum of 4,000*l.* of lawful money of Great Britain: OR, if the said [*infant*], the infant, or his heir or heirs-at-law, shall, within the time aforesaid, make out such title, and execute such conveyance as aforesaid; *Then* the above-*written obligation shall be void and of no effect; otherwise shall be and remain in full force and virtue.

and a further sum, by way of liquidated damages;

or if infant, or his heirs, should make out title and execute conveyance within the time appointed: bond to be void.

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Attestation.

SEALED AND DELIVERED by the above-bound [*two vendors*], (being first duly stamped (*b*),) in the presence of

(*b*) The *ad valorem* duty should be charged on 4,200*l.* 55 Geo. 2, c. 184, tit. BOND.

Stamp.

BOND *for the Performance of Covenants* (*a*) *contained in a Mortgage or Annuity Deed.*

TO PERFORM COVENANTS.

BOND from [*obligor*], of &c., to [*obligee*], of &c., in the sum of —— pounds, *at ante*, p. 179.

Obligation from one to one.

THE CONDITION of this obligation is such, that, if the above-bounden [*obligor*], his heirs, executors, and ad-

Condition for performance of covenants in

(*a*) In *Wilson* v. *Knubley*, 7 East, 128, the Court of King's Bench held, that an action of covenant does not lie upon the statute of fraudulent devises, 3 Wm. & Mary, c. 14, against a devisee of land, to recover damages for a breach of covenant made by the devisor; the remedy thereby given being confined to cases where *debt* lies. An action of covenant does not lie at common law against a devisee for damages, by breach of his testator's covenant; and therefore, although a vendor die seised of real estates, yet if they are devised by his will, a purchaser will not have any remedy against

An action of covenant does not lie against a devisee under the statute of fraudulent devises, if only damages are recoverable; but it seems otherwise where the covenant is to pay a sum certain.

TO PERFORM COVENANTS.

ministrators, do and shall, from time to time, and at all times hereafter, well and truly observe, perform, and keep, all and singular the covenants and agreements, which on his and their part are, or ought to be performed and kept, comprised and mentioned in one indenture bearing even date herewith, and made or expressed to be made between the above-named [*obligor*], of the one part, and the said [*obligee*], of the other part; *Then* this obligation to be void; otherwise to remain in full force and virtue.

indenture of even date.

Attestation.

SEALED AND DELIVERED, (being first duly stamped (*b*),) in the presence of

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the devisee, notwithstanding the covenants for title are broken, and there is no other fund to which he can resort for damages. A purchaser may, however, guard against the effect of a devise of the vendor's real estates, by taking a bond, conditioned to be void if the vendor is seised in fee and has good right to convey, &c. (following the words of the covenants in the deed, *mutatis mutandis*). The penalty would be a *debt*, recoverable under the statute. Such a bond is scarcely ever taken at the present day. Sudg. Ven. 499, 5th ed.; 565, 6th ed. However, Mr. Fearne recommended a bond] for performance of covenants, on the purchase of the *next* presentation to an advowson. Posthumous Work, 405.

But it seems, that, where a covenant is, to pay a sum certain, as it does not sound in damages, there an action of *debt* may be maintained on it, under the statute of fraudulent devises. *Vide ante*, Vol. 2, p. 360; *Thellusson* v. *Fletcher*, Doug. 316; *Holdipp* v. *Otway*, 2 Saund. 107; *Winter* v. *Trimmer*, 1 Wm. Bla. 395; *Lowe* v. *Peers*, 4 Burr. 2228. Therefore, if, by the purchase deed, the vendor covenants to pay the purchaser a certain sum, by way of liquidated damages, if he is not seised in fee, and has not good right to convey, and if the purchaser should not peaceably enjoy, &c., then, it seems that an action of debt may be maintained against the covenantor's devisee, on breach of either of the covenants.

What are actions which sound in damages.

[Actions which sound in damages are, *assumpsit*, covenant, trover, trespass, &c., because the judgment is only interlocutory, "that the plaintiff ought to recover his damages," leaving the amount of them to be afterwards ascertained. 1 Tidd's Practice, 586, 7th ed. *Note by Mr. B.*]

Stamp.

(*b*) Stamp, *one pound*. 55 Geo. 3, c. 184, p. 1562. But *quære* whether that extends any further than mortgage securities. [It seems not; and therefore if the contemporary deed containing the covenants, for the performance of which the bond is given, is not a mortgage, a stamp of 1*l*. 15*s*. would be requisite.]

BOND *for the Performance of an Agreement.*

TO PERFORM AGREEMENT.

BOND from [*obligor*], of &c., to [*obligee*], of &c., in —— hundred pounds, *ut ante*, p. 179.

Obligation from one to one.

THE CONDITION of the above-written obligation is such, that, if the above-bounden [*obligor*], his executors and administrators, shall and do, in and by all things whatsoever, for and on his and their parts and behalfs, observe, perform, fulfil, and keep all and singular the clauses, conditions, agreements, matters, and things, which on the part and behalf of the said [*obligor*], his executors or administrators, are, and ought to be observed, performed, fulfilled, and kept, according to a certain agreement in writing, bearing even date herewith, and made or expressed to be made between the said [*obligor*], of the one part, and the said [*obligee*], of the other part; *Then* the above-written obligation shall be void; but otherwise shall remain in full force.

Condition for performance of an agreement of even date.

BOND *from two Vendors, and their Surety, to a Purchaser, for the Performance of the Vendor's Covenants to convey the Premises sold.*

WITH SURETY, TO CONVEY LANDS SOLD.

BOND from [*two vendors*], of &c., and [*surety*], of &c., to [*purchaser*], of &c., jointly, and any two of them jointly, and each of them separately, in [*double the purchase money*] pounds, *ut ante*, pp. 179, 181, n. (*d*).

Obligation from three to one.

WHEREAS the said [*purchaser*] hath contracted with the above-bounden [*two vendors*] for the absolute pur-

Recital of contract for purchase:

WITH SURETY TO CONVEY LAND SOLD.

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chase of a moiety or half part of a certain messuage, &c. and the fee simple and inheritance thereof, free from in-*cumbrances, at or for the price or sum of —— pounds. And in consideration thereof, the said [*two vendors*], by indenture bearing even date with the above-written bond or obligation, and made between the said [*vendors*], of the one part, and the said [*purchaser*], of the other part, have entered into covenants, for the assurance of one moiety or half part of the said messuage, &c. unto the said [*purchaser*], his heirs and assigns, at the time, and in manner therein mentioned; and for the quiet enjoyment of the same moiety or half part, free from incumbrances, in the mean time, and until such conveyance or assurance shall be made thereof, in such manner as in the same indenture is also expressed. AND WHEREAS, upon the treaty for such purchase, it was agreed between the said [*two vendors*], [*purchaser*], and [*surety*], that they, the said [*two vendors*], together with the said [*surety*], as their surety, should enter into a bond, with a sufficient penalty; conditioned to be void, upon the due performance of the covenants contained in the said indenture, bearing even date herewith, on the part of them the said [*vendors*], as hereinafter mentioned.

indenture containing covenants to convey, and for quiet enjoyment in mean time:

and agreement for bond from vendors and surety, for performance of the covenants:

NOW THE CONDITION of the above-written obligation is such, that, if the above-bounden [*two vendors*], and each of them, their, and each of their heirs, executors and administrators, shall and do from time to time, and at all times, well and truly observe, perform, fulfil, and keep all and every the covenants, articles, and agreements, mentioned and contained in the said indenture bearing even date herewith; and which by them, or either of them, and on their, or either of their part and behalf, are or ought to be observed, performed, fulfilled, and kept, in all things, according to the purport, true intent, and meaning of the same indenture; *Then* the above-written obligation shall be void; but otherwise shall remain in full force (*b*).

Condition for performance of covenants by vendors.

Stamp.

(*b*) Stamp, *ut ante*, p. 317, n. (*b*).

BOND *from Two Builders, and their Two Sureties, for the due Performance of a Contract for Building a School, and Altering and Repairing a House.*

WITH TWO SURETIES, TO PERFORM CONTRACT FOR BUILDING, &c.

KNOW ALL MEN BY THESE PRESENTS, *That We* [*two builders*], both of, &c., and each of us, are and is jointly and severally held, and firmly bound to [*trustee*], of &c., (a trustee nominated by and on behalf of the managers of the schools of the parish of Saint George, Hanover Square, in the county of Middlesex), in the penal sum of one thousand pounds of lawful money of Great Britain and Ireland; AND *That* We [*surety*], of &c. and [*other surety*], of &c., (as the sureties for the said [*two builders*], their executors and administrators), are severally and respectively held, and firmly bound to the said [*trustee*], in the penal sums of one thousand pounds each, of such lawful money as aforesaid: ALL the said several sums to be paid to the said [*trustee*], or his certain attorney or attornies, executors, administrators, or assigns: FOR which said payment to be well and truly made by us the said [*two builders*], *We*, the said [*two builders*], bind ourselves, jointly and severally, our, and each of our heirs, executors, and administrators, and every of them; *And* for which several payments to be well and truly made by us, the said [*two sureties*], respectively, We, the said [*two sureties*], respectively, bind ourselves respectively, and our respective heirs, executors, and administrators, and every of them, firmly by these presents; *Sealed* with our seals: DATED the —— day of ——, 18—.

Obligation to a trustee for the managers of parish schools, from two principals, jointly and severally, with a separate lien part from two sureties severally, in an additional penalty.

WHEREAS the above-bounden [*two builders*] have lately entered into a contract and agreement in writing, with

Recital of contract to erect and finish

WITH TWO SURETIES, TO PERFORM CONTRACT FOR BUILDING, &c.

schools, and to alter and repair a house, agreeably to specification:

the managers of the schools of the parish of Saint George, Hanover Square, aforesaid, whereby they have contracted and agreed with the said managers to do the whole of the works, in erecting and completely finishing the buildings of an intended new school, with the privies, staircases, &c. attached thereto; and to make alterations and reparations in the present house in South Street, Grosvenor Square, belonging to the said managers, in every respect agreeably to the drawings, agreements, conditions, clauses, and particulars mentioned, specified, particularized, and contained, in a certain paper or writing, intituled "[*title of paper*]," at or for the price or sum of —— pounds. AND WHEREAS, at the time of entering into such agreement as aforesaid, the said [*two builders*], and their said sureties, the said [*two sureties*], agreed to execute the above-written bond or obligation for the due performance of the several works so contracted to be done as aforesaid, according to the specification aforesaid.

and agreement that principals and sureties should give bond for due performance of contract.

Condition for due performance of contract.

NOW THEREFORE THE CONDITION of the above-written bond or obligation is such, that, if the above-bounden [*two builders*], or either of them, or their, or any or either of their heirs, executors, or administrators, do and shall, within —— calendar months from the date of the above-written bond or obligation, do, perform, execute, and completely finish, or cause to be done, performed, executed, and completely finished, all and singular the several erections, buildings, alterations, repairs, and other works mentioned, specified, and particularized in the hereinbefore mentioned specification, conformably to the same specification in all respects whatsoever, and in a good and workmanlike manner; *Then* the above-written bond or obligation shall be void; but otherwise the same shall remain in full force and virtue.

BOND *from a Vendor to a Purchaser, to procure an Assignment of an Outstanding Term.*

TO PROCURE ASSIGNMENT OF TERM.

BOND from [*vendor*], of &c., to [*purchaser*], of &c., in [*double the purchase money*] pounds, *ut ante*, p, 179.

Obligation from one to one.

WHEREAS, &c. (*recite contract for purchase; creation of term, and that it is outstanding, ut ante*, Vol. 1, p. 117, 118; *and assignment of the term in trust for a purchaser, and to attend, &c. ut ante*, Vol. 2, p. 163.) AND WHEREAS the said [*purchaser*] hath, at the request of the said [*vendor*], agreed to complete his said purchase, without requiring, for the present, an assignment of the messuage or tenement, lands, and other premises comprised in the said term of five hundred years, to a trustee for himself, for the residue of the said term; and to accept from the said [*vendor*] his bond or obligation, with a suitable condition, within six calendar months, to procure such assignment, and to do, and cause to be done, such acts and things in relation thereto, as hereinafter expressed. AND WHEREAS, in pursuance of the said recited contract, and subsequent agreement, by indentures of lease and release, the lease bearing date the day next before the day of the date of the release, and the release bearing even date with the before-written bond, and made, &c. (*state the purchase deed shortly*).

Recital of contract; creation and assignment of term:

that purchaser has agreed to complete his purchase, without at present requiring assignment of term;

and to accept vendor's bond to procure assignment within six months:

Recital of conveyance to purchaser.

NOW THEREFORE (in pursuance of the before-recited agreement of the said [*vendor*], to secure the assignment of the said premises, for the residue of the said term of five hundred years,) THE CONDITION of the before-written obligation is such, that, if the said [*vendor*], his heirs, executors, or administrators, do and shall, at any time within six calendar months, to be computed from the day of the date of the before-written bond or obligation, at his

Condition to discover trustee's personal representative, or to procure limited administration to him:

TO PROCURE ASSIGNMENT OF TERM.

or their own costs and charges, either discover and ascertain the personal representative of the said [*trustee*], or else cause and procure letters of administration to be granted by the proper ecclesiastical court in such behalf, to some proper person or persons, of the personal estate and effects of the said [*trustee*], which now remain unadministered, so far as respects the messuage or tenement, lands, and other premises, comprised in the said term of five hundred years, and by the said [*mortgagee*] assigned to the said [*trustee*] for all the then residue of the same term, in trust as aforesaid: AND ALSO do and shall thereupon, at the like costs and charges of him the said [*vendor*], his heirs, executors, or administrators, cause and procure any such personal representative of the said [*trustee*], to be discovered, or so to be constituted, as to the said term as aforesaid, well and effectually to assign and set over all and singular the messuage or tenement, lands and other premises, comprised in the said term of five hundred years, with their appurtenances, unto such person or persons as the said [*purchaser*], his heirs or assigns, shall nominate or appoint, for all the then residue and remainder of the same term, *In trust* for him the said [*purchaser*], his heirs or assigns: *And* to assign, or otherwise dispose of, the same premises, as he or they shall, from time to time, order and direct: *And*, in the mean time, *In trust*, to permit the rest and residue of the said term, to wait upon and attend the reversion and inheritance of the same messuage or tenement, lands and other premises, so as to be subservient thereto, and to protect the same from all mesne and intervening incumbrances, if any such there be; *Then* the above-written obligation shall be void; but otherwise shall be in full force.

and to cause such personal representative to be discovered, or so to be constituted, to assign the premises to such person as purchaser shall nominate, for residue of term, *In trust* for him, and to attend, &c.

FOR CONVEYANCE BY INFANT, OR HIS HEIRS, &c. AND FOR QUIET ENJOYMENT IN MEAN TIME.

BOND (*a*) *from four Obligors to a Purchaser, that an Infant, and those claiming through him, or his Mother deceased, shall, within Six Months after he attains Twenty-One; or in case of his Death previously, his Heirs, &c. or those claiming through him or his Mother, shall* CONVEY FREEHOLD, AND SURRENDER COPYHOLD LANDS; *to an undivided Part of which the Infant is entitled, in common with the Obligors; and of which a Conveyance and Covenant to surrender to the Purchaser has*

(*a*) BONDS, CONSIDERED ON THE GROUND OF UNLAWFULNESS.

Bonds with conditions against the law are void.

Bonds with conditions expressly against the law are void. Noy's Maxims, 78. For transactions which have for their object the encouragement of manifest crimes, such as murder, theft, perjury, and personal outrage, can never receive the sanction of a Court of judicature; and any engagement for a reward to abstain from such crimes, is equally discountenanced, as it might effectually lead either to criminality or extortion. Shep. Touchs. 132. So, every transaction, the object of which is the violation of a public or private duty, is also void: such are bribes for appointing to offices of trust; private engagements that an office shall be held in trust for a person by whose interest it was procured; agreements to stifle a prosecution for any crime of a public nature. See *Parsons* v. *Thompson*, 1 Hen. Bla. 322; *Garforth* v. *Fearon*, Ibid. 327; *Blachford* v. *Preston*, 8 Durnf. & East, 89; *Collins* v. *Blantern*, 2 Wils. 347; 1 Fonbl. Treat. of Eq. 255, 5th ed.; 2 Evans's Pothier on Contracts, 2.

So every transaction, the object of which is the violation of a public or private duty, is also void.

Instances of conditions against law.

All the instances of conditions against law, in a proper sense, are reducible under one of these heads:

1st. Either to do something which is *malum in se*, or *malum prohibitum*. Co. Lit. 206.

2dly. To omit the doing of something which is a duty. Palm. 172. Hob. 12, *Norton* v. *Simms*.

3dly. To encourage such crimes and omissions. Fitz. tit. *Obligation*, 13; Bro. tit. *Obligation*, 34; Dyer, 118.

FOR CONVEYANCE BY INFANT, OR HIS HEIRS, &c., AND FOR QUIET ENJOYMENT IN MEAN TIME.

been executed by the Obligors, the Infant, and Others, by Indentures of even Date: and the Obligors and Infant have been paid their Shares of the Purchase Money: AND *that, in the mean Time, the Purchaser, his Heirs, &c. shall quietly enjoy the Premises, without any Interruption from the Infant, his Heirs, &c. or those claiming through him or them, or through his Mother deceased.*

Obligation from one to one.

BOND from [J. C.], of &c., [W. C.], of &c., [J. R.], of &c., and [H. B.], of &c., to [*purchaser*], of &c., in [*double the sum paid to the Infant*] pounds, jointly, and any three or two jointly, and each of them severally, *ut ante*, p. 181.

Recital of lease and release to the purchaser,

WHEREAS by indentures of lease and release, the lease bearing date the day before the release, and the release

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Such conditions as these the law will always, and without any regard to circumstances, defeat; being concerned to remove all temptations and inducements to those crimes; and therefore, as in Noy, and in Co. Lit. 206, a feoffment shall be absolute for an unlawful condition subsequent, and a bond void. But where there may be a way discovered to perform the condition, without a breach of the law, it shall be good. Hob. 12; Cro. Car. 22; Perk. s. 228. *Mitchell* v. *Reynolds*, 1 P. Wms. 189; in which case the subject is treated in a masterly manner. See also Com. Dig. *Chancery*, (4 D. 5).

A bond may be good in part, and bad in part.

Where the condition of a bond is entire, and the whole is against law, it is void; but where the condition consists of several different parts, and some of them are lawful, and the others not, it is good for so much as is lawful, and void for the rest. *Rex* v. *Yale*, 2 Brown P. C. 381; 5 Vin. Abr. 99, pl. 9; *Chesman* v. *Nainby*, 2 Ld. Raym. 1459; 2 Stra. 744, *S. C.* *Norton* v. *Simms*, Hob. 14; Mo. 856, 857, pl. 1175; *Twyne's* case, 3 Co. 83 a; *Mosdell* v. *Middleton*, 1 Vent. 237; 1 Saund. 66 a; *Newman* v. *Newman*, 4 Maule & Selw. 71; *post*, p. 422. But, if a sheriff take a bond for a point against 23 Hen. 6, concerning bail-bonds, and also for a just debt, the whole bond is void; for the letter of the statute is so. *Norton* v. *Simms*, Hob. 14; 3 Vin. Abr. 451.

Bonds considered on the ground of unlawfulness.

Those bonds which chiefly deserve consideration, on the ground of unlawfulness, are such as relate to:—

Restraining trade.

I. BONDS RESTRAINING TRADE. As to which, *vide ante*, Vol. 1, p. 172, n. (*d*); *ante*, p. 289, n. (*a*); *post*, p. 439.

bearing even date with the above-written bond, and made between [Sir G. W.], knight, of the first part; the said [J. C.], and [W. C.], of the second part; [G. W.], of the third part; the said [J. B.], and [H. B.], and [*infant*], of the fourth part; [B. E. S.], of the fifth part; [G. M.], and

to uses to prevent dower:

II. Bonds of Resignation. As to which, *vide post*, p. 360.

Resignation.

III. Marriage Brocage-bonds.

Marriage brocage bonds are good at law, but not in equity.

Though these bonds are good at law, yet in equity they are justly condemned as introductive of infinite mischief. *Law* v. *Law*, 3 P. Wms. 394. However, equity does not interpose on account of any particular injury done to the party, who is *particeps criminis*, and not entitled to relief, but on public considerations, that marriage, as it greatly concerns the public good, may be on a proper foundation; *Law* v. *Law*, Cas. Temp. Talb. 132; 2 Eq. Ca. Abr. 187, pl. 2; *Debenham* v. *Ox*, 1 Ves. 277; and therefore, such a bond is in no case to be countenanced. Thus, where the plaintiff gave a bond to the defendant, conditioned in effect, that if the plaintiff married J. S., then the plaintiff to pay a certain sum of money; the defendant procured the marriage, and put the bond in suit; but it was decreed to be delivered up, the young gentlewoman having 2,000*l.* portion, and the man being sixty years of age, and having seven children. *Drury* v. *Hooke*, 1 Vern. 412; 2 Ch. Ca. 176; See Ch. Rep. 87; Tothill, p. 27, edit. 1820. So, a bond for payment of 500*l.*, for procuring a marriage between persons of equal rank, fortune, &c., was, on appeal from the Court of Chancery, declared by the House of Lords to be void; because such bonds to match-makers are of dangerous consequence, and tend to the betraying and ruining persons of fortune and quality, and are not to be countenanced in equity; for marriage ought to be procured by the mediation of friends and relations; and such bonds would be of evil example to executors, guardians, trustees, servants, and others, who have the care of children. *Hall* v. *Potter*, Show. P. C. 76; *Smith* v. *Aykwell*, 3 Atk. 566. So, a bond to *give* money, if such a marriage could be obtained, is ill; and, by the same reason, a bond to *forgive* a sum of money, in the same event, must be ill also. *Hamilton* v. *Mohun*, 1 P. Wms. 120. So, wherever a mother or father, or guardian, insist upon a private gain, or security, for obtaining or consenting to a marriage, and obtains it of the intended husband, it will be set aside in equity. Thus, J. S., by will, gave his niece 1,200*l.*; she married, but, antecedently to the marriage, her father took a bond from the then intended husband to pay him 200*l.* in case the daughter should die without issue male in the life-time of her husband; the daughter died without issue male, living her husband; the father sued the husband at law upon the bond, and the husband on a bill was relieved against this bond; for, it appearing that no money was

If a parent or guardian insist on a private gain, or security, for obtaining or consenting to a marriage, and obtains it of the intended husband, it will be set aside in equity.

FOR CONVEYANCE BY INFANT, OR HIS HEIRS, &c. AND FOR QUIET ENJOYMENT IN MEAN TIME.

[S.], his wife, of the sixth part; the above-named [*purchaser*], of the seventh part; and [*trustee to prevent dower*], of the eighth part; *In consideration* of the sum of —— pounds, paid by the said [*purchaser*], to the said [J. B.], [H. B.], and [*infant*]: and of the sum of ——

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paid, nor any consideration for entering into it, the Court took it to be in the nature of a marriage brocage bond, and therefore ordered it to be delivered up. *Anon.* 2 Eq. Ca. Abr. 187, pl. 1; *Lamblee* v. *Hanman*, 2 Vern. 466, 499; *Hamilton* v. *Mohun*, 1 P. Wms. 118; Salk. 158; 2 Vern. 652; Gilb. Chan. 297; 1 Eq. Ca. Abr. 90, pl. 6; 10 Mod. 447; *Keat* v. *Allen*, 2 Vern. 588; *Anon.* Prec. Chan. 267; *Tooke* v. *Atkins*, 1 Vern. 451; *Gale* v. *Lindo*, 1 Vern. 475; *Kemp* v. *Coleman*, 1 Salk. 156; *Cole* v. *Gibson*, 1 Ves. 503; Belt's Supp. 211; *Hylton* v. *Hylton*, 2 Ves. 547. The power of a parent or guardian ought not to be used for such purposes, as it would be making a way to enable them to sell infants under their care. And these contracts with the father, mother, or guardian, though of the same nature with brocage bonds, are of more mischievous consequence, because it would happen more frequently. And it is now a settled rule, that, if the father, on the marriage of his son, take a bond of the son, to pay him a sum of money, or make him any recompence, it is void, being procured by coercion while he is under the control of his father. Treat. of Eq. B. 1, ch. iv. s. 10; Fonbl. 5th ed. 260. And as these contracts are avoided on reasons of public inconvenience, they will not admit of subsequent confirmation by the party; *Shirley* v. *Martin*, 1 Fonbl. 264, n. (1); 3 P. Wms. 74; *Cole* v. *Gibbon*, 1 Ves. 506; *Morse* v. *Royal*, 12 Ves. 364, 373; *Crow* v. *Ballard*, 1 Ves. jun. 220; *et vide ante*, pp. 226, 256; and, consequently, the party entitled to relief in a Court of equity cannot release his right to a remedy, and thereby indirectly effect a confirmation, as it would be contrary to the maxims—that which is originally bad cannot be made good; and that which cannot be done directly cannot be done indirectly. *Sed vide* 1 Ves. 507. And the Court will decree a gratuity actually paid, to be refunded: Thus, where a servant maid prevailed with her master's niece, who was about fifteen years old, and lived in the same house with him, and was entitled to a good fortune, to marry his journeyman, without the consent or knowledge of her uncle; and for the good offices she was to do the journeyman in that affair, he had given her a bond of 100*l.* conditioned to pay her fifty guineas at six months' end; and after he had gained the niece's good will, by the help of this maid, and the young lady had been prevailed on to go with him in a hackney coach to be married, he gave the maid fifty guineas more: the marriage was had; and afterwards the maid servant married, and the bond not being paid, was put in suit, and judgment obtained on it; and a bill was brought against the defendants, the maid servant and

So, if the father, on his son's marriage, take the son's bond, to pay him money, or make him any recompence, it is void.

The Court will decree a gratuity actually paid to be refunded.

pounds paid by the said [*purchaser*] to the said [J. C.], and [J. B.]; and of the sum of —— pounds, paid by the said [*purchaser*] to the said [J. C.] and [W. C.]; the said [Sir G. W.], and [G. W.], (by the direction of the said [J. C.], [W. C.], [J. B.], [H. B.], and [*infant*]; and

FOR CONVEYANCE BY INFANT, OR HIS HEIRS, &c. AND FOR QUIET ENJOYMENT IN MEAN TIME.

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her husband, to be relieved against this bond, and to have the fifty guineas repaid; because the bond was entered into, and the money given for no good consideration, but only on account of this marriage brocage. And the Master of the Rolls decreed the bond to be given up, and satisfaction to be acknowledged on the judgment, and the fifty guineas received to be repaid; and if it were not done on service of the order, the defendants were to pay costs; and this, notwithstanding the husband of the servant maid insisted by his answer, that he looked upon the bond and fifty guineas as his wife's fortune, and had married her in prospect of it: and this decree was affirmed by Lord Keeper Wright. *Goldsmith* v. *Bruning*, 1 Eq. Ca. Abr. 89, pl. 4; *Smith* v. *Bruning*, 2 Vern. 392, *S. C.*

IV. In restraint of Marriage and its rights.

In restraint of marriage and its rights.

A bond to marry a particular person, or not to marry at all, is void.

It was a rule in the civil law, that marriage ought to be free. 3 Ves. 96. The same policy has obtained in equity: and therefore in case of a bond in common form for payment of money, but proved that the agreement was, that the obligor should marry such a man, or should pay the money due on the bond; the Court will decree this bond to be delivered up to be cancelled, as being contrary to the nature and design of marriage, which ought to proceed from free choice, and not from any compulsion. *Key* v. *Bradshaw*, 2 Vern. 102; 1 Eq. Ca. Abr. 88. So, if A., being a widow, gives a bond to B. for 20*l.* if she should marry again, and B. gives a bond to the widow, to pay her executors the like sum if she did not marry again, and the widow soon after marries, her bond will be decreed to be delivered up. *Baker* v. *White*, 2 Vern. 215; *Woodhouse* v. *Shepley*, 2 Atk. 535. See *Lowe* v. *Peers*, 4 Burr. 2225; *Bateman* v. *Wells*, Tothill, p. 25, ed. 1820. So, where a bequest of an allowance to a *feme covert* was made on condition that she lived apart from her husband, the condition was held *contra bonos mores*, and void. *Brown* v. *Peck*, 1 Eden, 140. However, there is a very late case, the principle of which seems opposed to the last cited case. It is thus stated, "A legacy was given to a father, on condition that he did not interfere with the education of his daughter. On a bill by the father for the legacy, the Court required from him security to that effect, to be approved by the Master, and directed the costs of the proceedings to be paid out of the legacy." *Colston* v. *Morris*, 6 Madd. 89. It is presumed that the reporter has omitted some material circumstance, which was the ground of this decision; such as that the

A bequest, on condition that a woman lived apart from her husband, is void.

FOR CONVEYANCE BY INFANT, OR HIS HEIRS, &c. AND FOR QUIET ENJOYMENT IN MEAN TIME.

(with the consent of the said [B. E. S.], and [G. M.], and [S.] his wife), *have* bargained, sold, and released; *And* the said [J. C.], [W. C.], [J. R.], [H. R.], [*infant*], and [B. E. S.] *have* granted, released, and confirmed; *and* the said [G. M.], and [S.] his wife, *have* remised, released, and

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father was a profligate character, and therefore unfit to interfere in the education of his child: for otherwise, the case is contrary to the general policy of the law, which encourages and preserves filial duty.

To a kept mistress.

V. To a kept Mistress.

Both Courts of Law and Equity make a distinction, when it *appears* that these bonds are given as a reward for *past cohabitation*, and when it appears that they are given as an inducement to *future concubinage*; and therefore,

Præmium pudicitiæ, where the man is unmarried.

A bond, purporting to be in consideration of past cohabitation, is good.

1st. *Præmium pudicitiæ*, where the man is unmarried.

A bond purporting to be *in consideration of cohabitation had* between the obligor and obligee, was held to be good; *per Clive, Bathurst*, and *Gould*, Justices, (absent Chief Justice *Wilmot*), without hearing the other side. *Clive*, Justice.—I am in a Court of common law, and not in an ecclesiastical Court. If a man has lived with a girl, and afterwards gives her a bond, it is good. Suppose this bond had been given by the defendant to the plaintiff for being his mistress, it would have been good in point of law, although in a Court of equity it would be postponed to creditors. Sir *Joseph Jekyll*, Master of the Rolls, in a case where creditors interfered against a bond of this sort, wished he could have given the lady the money upon the bond: and where it is *præmium pudoris*, a Court of equity will not relieve against such a bond. This condition is incapable of an explanation, to make the bond an illegal act. *Bathurst*, Justice.—Where a man is bound in honour and conscience, God forbid that a Court of law should say the contrary: and wherever it appears that the man is the seducer, the bond is good. *Bracton* says, when a man cohabits with an unmarried woman, it is *legitima concubina*. And *Exodus*, cap. xxii. v. 16. "*If a man entice a maid who is not betrothed, and lie with her, he shall surely endow her to be his wife.*" See also *Deuteronomy*, cap. xxii. v. 28, 29.—"If a man find a damsel, who is a virgin not betrothed, and lay hold of her, and lie with her, *and they be found;* then the man who laid with her shall give unto the damsel's father fifty shekels of silver, and she shall be his wife; because he hath humbled her, he may not put her away all his days." Honour and conscience ought to bind every man in point of law. In an action in the King's Bench, upon a promise of marriage, the evidence upon the trial was, that the defendant had bragged and boasted

for ever quitted claim unto the said [*purchaser*], and to his heirs, *All that, &c. To hold* the same (*subject*, as in the said indenture of release is mentioned,) unto the said [*purchaser*], and his heirs: *To the use* of such person or persons, &c. (*Uses to prevent dower, ut ante*, Vol. 1,

FOR CONVEYANCE BY INFANT, OR HIS HEIRS, &c., AND FOR QUIET ENJOYMENT IN MEAN TIME.

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that he had debauched the plaintiff, by promising her marriage. This cause being tried before me on the circuit, I left it to the jury upon that evidence only, and they gave a verdict for the plaintiff, and 500*l.* damages, which I thought right. The Court of King's Bench, approving of my opinion, refused to set aside the verdict, and thought 500*l.* damages were little enough. *Gould*, Justice.—The Court may take this for a lawful and conscientious consideration. We must presume that the defendant has done what in honour and conscience he ought to have done; and that he thought himself a wrong-doer, and gave the plaintiff this bond to make her amends. *Turner* v. *Vaughan*, 2 Wils. 339.

A bond, even to a woman who has been a common prostitute, in consideration of past cohabitation, is good, because it enables her to lead a virtuous life.

Formerly, it has been held in a Court of equity, that if it were charged in a bill, and proved in evidence, that the defendant was a common strumpet, and commonly dealt and practised after that manner, and was accustomed to draw in young gentlemen, the Court would relieve against a bond given to such a woman. *Whaley* v. *Norton*, 1 Vern. 484. Though, it seems, even in case the woman had been a prostitute, the Court would not formerly relieve the party himself, who was culpable; though it was otherwise when his executor sought relief. *Matthew* v. *Hanbury*, 2 Vern. 187; *Bainham* v. *Manning*, 2 Vern. 242; *Bodly* v. ——, 2 Ch. Ca. 15. 19 Vin. Abr. 301, (E). However, the liberality of modern judges has softened this severity, on the ground that a provision enables a woman, in such an unfortunate situation, to lead a course of life more conducive to her happiness and to public morality. A voluntary bond given by a person to a common woman, after he had kept her two years, was not relieved against, upon a bill by the executor of the obligor. *Hill* v. *Spencer*, Ambl. 641. Lord *Camden*, in delivering his judgment, said, "I am clear in my opinion, that the plaintiff is not entitled to relief. The cases which have been determined against securities given to common prostitutes, went upon the circumstances of the *securities* being given *previous* to the *cohabitation; a consideration, which being* turpis *in its nature, the Court has relieved against them.* In this case, the bond was not given for a consideration, but was voluntary. He had resort to her for near two years before he gave her the bond. Past service could not be a consideration at law [*quære, de hoc*]; and nothing was stipulated for the future. There is no principle in equity which says, a man may not give a voluntary bond to a common prostitute: it would be going but a little further to say, he could not give her money without her being liable to be called upon for it. There is no circumstance

and covenant to surrender copyholds.

p. 652). And by the said indenture of release, and for the considerations thereinbefore expressed, the said [J. C.], [W. C.], [J. R.], [H. R.], and [*infant*], for themselves severally, and for their respective heirs, executors, and administrators; *and* the said [G. M.], for himself, his

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of fraud in this case; and I do not think, that, in the case of a voluntary bond, the obligee being a common prostitute, is, of itself, a sufficient ground for relief." And, according to that case, the woman having been criminally connected with another man after she was taken into keeping, does not invalidate the bond. So, where a voluntary bond was given during cohabitation, to a woman previously of a very loose life, and soon afterwards another bond, expressly securing a continuance of the connexion, by an annuity in case of separation; a bill by the executor to have the bonds delivered up, was, by the Court of Exchequer, dismissed with costs: the former being considered unimpeached, and the latter void at law, as *pro turpi causâ*. *Gray* v. *Mathias*, 5 Ves. 286. So, a bill brought to be relieved against a bond given *to a housekeeper for secret service*, was dismissed. *Bainham* v. *Manning*, 2Vern. 242.

Præmium pudicitiæ pellicis. If the consideration of the bond be for past cohabitation with a married man, equity will not *assist* the woman, if she knew he was married.

2nd. *Præmium pudicitiæ pellicis.*

If the consideration be for past cohabitation with a married man, equity will not *assist* the obligee, if she knew the obligor was a married man. Thus, a bill for payment of a sum of money, and an annuity secured by a deed-poll by defendant to plaintiff, who, being a young woman, came to live in the family of the defendant, then a married man, as a companion to his sister, and who, by continuing to live with him, occasioned a separation from his wife, was dismissed, but without costs, on account of her previous good character. *Priest* v. *Parrot*, 2 Ves. 160.

A married man, after having lived in adultery with a woman, and had children by her, executes a deed, providing for her and the children, in case of his death, and deposits it in the hands of his attorney, but afterwards procures possession of it himself.—Held, on demurrer, that the woman and her

However, where there are children, the modern doctrine of the Court is more liberal. Thus in *Knye* v. *Moore*, 1 Simons & Stuart, 61, the bill stated that the plaintiff, Sophia Knye, became, in the year 1808, servant to the defendant, and for four years conducted herself with strict propriety; that, in the year 1811, some differences having arisen between the defendant and his wife, the defendant began to pay very particular attention to the plaintiff, S. Knye, and proposed to her to cohabit with him; that she at length yielded to his solicitations, and agreed to his proposals; that in 1812, defendant fitted up a cottage in the neighbourhood for her, where she resided and cohabited with him until some time in the year 1816, and in the course of such cohabitation was delivered of four children, of whom the defendant was the father, namely, the plaintiffs Henry and Charles, and two other children since dead; that, in the year 1816, the defendant having several legitimate children, became desirous of putting an end to

heirs, executors, and administrators, and for the said [S.] his wife, *have* covenanted with the said [*purchaser*], his heirs and assigns, that they the said [J. C.], [W. C.], [J. R.], [H. R.], [*infant*], [G. M.], and [S.] his wife, [Sir G. W.] and [G. W.], respectively, and their respective

FOR CONVEYANCE BY INFANT, OR HIS HEIRS, &c., AND FOR QUIET ENJOYMENT IN MEAN TIME.

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the connexion,and of making a due provison for the plaintiff, Sophia Knye, and the other plaintiffs, her children; and for that purpose, wrote and sent a letter to her, dated 21st August, 1816, whereby he informed her, that his absence from England, which would take place immediately, made their separation nrcessary, and requested her to quit the cottage; and assured her, that so long as the children were maintained at her expense, and her conduct justified her claim upon him, she should be provided for by an allowance of 100*l.* a year, to be paid by his bankers; and that if any accident happened to him, she and the children were provided for by a deed executed by him, and left in trust with his attorney, Mr. H.: that being extremely desirous of putting an end to the connexion, she agreed to quit the cottage, and accept the provision; and that in pursuance of the agreement, she gave up possession of the cottage, and accepted the provision of 100*l.* a year; and that she had, ever since August, 1816, wholly supported her children, and conducted herself with propriety: that the defendant, for a short time after entering into the agreement, remitted to her from time to time various sums of money, on account of the promised provision; but that since July, 1820, he had ceased to pay her any sum on account thereof, and had also procured the deed, mentioned to have been executed by him for the benefit of her and her children, to be delivered into his custody or possession; and that he refused to deliver up the same, or to discover the contents thereof.

children can maintain a bill to compel him to deliver up this deed: that the person with whom the deed had been deposited need not be made a party, as no breach of trust was charged against him; and that the bill was not multifarious, though it also sought performance of an agreement to pay an annuity to the woman, which could not be decreed in equity.

The bill charged, that it was fully agreed between the defendant and the plaintiff Sophia Knye, for the purpose of putting an end to the connexion between them, that the defendant should, during his life, pay her the annual sum of 100*l.*, as a provision for the support and maintenance of herself and children; and that the letter above mentioned contained the terms of this agreement; and that the agreement was by the letter duly reduced into writing, and was, in equity, a good and valid agreement on the part of the defendant, to pay to the plaintiff, during his life, the annual sum of 100*l.*; and that the payments made by him were acts of part performance of the agreement.

The bill prayed a specific performance of this agreement, and that the defendant might be decreed to pay to the plaintiff, S. Knye, the arrears and future payments of the annuity, during his life, she being willing to support and maintain the children; and that the defendant might be decreed to deliver up the deed, and that it might be deposited in safe custody.

FOR CONVEYANCE BY INFANT, OR HIS HEIRS, &c., AND FOR QUIET ENJOYMENT IN MEAN TIME.

heirs and assigns, and [B. S.] and [R. W.], their heirs or assigns, would as soon as conveniently might be, by common recovery or common recoveries, surrender or surrenders, or other customary assurance, surrender and assure, according to the custom of the manor of [B.], in the said

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To this bill the defendant demurred for want of equity. And in support of the demurrer it was urged—*First*, this is not one of those cases where a man, having debauched a woman, makes a provision for her; but this is the case of a married man, and comes within the doctrine laid down in *Priest* v. *Parrot*, 2 Ves. 160. That case has been cited in the House of Lords, and the doctrine of Lord *Hardwicke* acknowledged; it was also cited to the Master of the Rolls, in *Matthews* v. *L.*, 1 Madd. 558, and not objected to. There is no case in which this Court has held a deed like the present, made by a married man, to be valid. See *Spicer* v. *Hayward*, Precedents in Chancery, 114; and the *Marchioness of Annandale* v. *Harris*, 2 P. W. 432; and 3 Bro. P. C. 445. *Secondly*, The demurrer is also sustainable *ore tenus*, for multifariousness. The first part of the bill states an agreement with the mother only, by which she was to receive 100*l.* a year, in consideration of former cohabitation. As to this, she alone is entitled to sue; she cannot join to that claim another in which she and other persons are jointly interested; for, as to the other matters, she claims jointly with her children. *Thirdly*, Another ground of demurrer is, that, if they come here for this deed, the person in whose hands the bill states the deed to have been deposited, ought to have been a party to this suit.

In support of the bill, it was said that this case was distinguished from *Priest* v. *Parrott*, by the circumstance of there being children, who are innocent parties.

Equity will not decree a specific performance of a voluntary promise by letter, in favor of a woman seduced.

The Vice-Chancellor, Sir *John Leach*, said, the agreement, contained in the letter stated in the bill, must be considered as merely voluntary; therefore, a bill will not lie for the performance of it. But it is a very different question, whether the defendant must not answer as to the deed of settlement which he is alleged to have executed and delivered to a trustee for the plaintiffs, and afterwards to have improperly obtained again from the trustee.

Courts of equity will lend their aid to enforce securities given as *præmium pudicitiæ*, if the woman did not

It seems to be established by the case of the *Marchioness of Annandale* v. *Harris*, 2 P. W. 432, 3 Bro. P. C. 445; (which afterwards went to the House of Lords), and by *Ord* v. *Blackett*, and *Carew* v. *Safford*, there cited), that Courts of equity will lend their aid to enforce securities given as the *præmium pudicitiæ*. Lord *Hardwicke* states, 2 Ves. 161, that in *Annandale* v. *Harris*, it appeared that Lord Annandale was not married at the time of his connexion with the defendant. No such circumstance is stated in the report, nor does it appear to have formed any ingredient in

county of [Y], *All that*, &c. with their appurtenances; *To the use* of the said [*purchaser*], his heirs and assigns, according to the custom of the said manor of [B.]. AND WHEREAS the said [*infant*], is an infant of the age of —— years, or thereabouts, and the part or share of the said [*in-*

Recital of infancy, and payment of infant's share of pur-

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the decision. The principle of that case is, that if a man misleads an innocent woman, it is but justice and reason that he should make her reparation; and, therefore, notwithstanding the immorality of the connexion which led to the provision, a Court of equity will lend its aid to enforce it. If a woman be the victim of a married man, it is not less justice and reason that he should make her reparation than if he were unmarried; and the deeper shade of immorality in the connection is not a very tangible or satisfactory ground of distinction. In the case of *Pricst* v. *Parrot*, there were no children. Now here, in the first place, the deed is a provision for the mother and her children, and they are co-plaintiffs; and if I was to decide that the mother could not maintain this bill, there is no principle that the children could not. The case of the children here makes it quite clear, that this general demurrer cannot be maintained. It is then said, that there is a defect of parties; because the person to whom the deed was delivered, is not before the Court. If the trustee had delivered up the deed in breach of his trust, then he ought to have been before the Court, in order to be charged in respect of such breach, but not otherwise. Another objection is taken to the bill, as being multifarious, because it seeks for the performance of an agreement under which the mother alone is entitled; and joins to this another claim, in which she is interested jointly with her children. But the whole case of the mother being properly the subject of one bill, the suit does not become multifarious because all the plaintiffs are not interested to an equal extent. Demurrer over-ruled.

know that the man was married.

If a woman be the victim of a married man, it is not less justice and reason that he should make her reparation than if he were unmarried.

[The question afterwards came before the Court on bill and answer, 2 Sim. & Stu. 260, when the Vice-Chancellor sent a case to the Court of King's Bench, to inquire whether the circumstance of the defendant's being a married man, was a good defence, at law, to an action on such a bond; and that Court certified in the negative. *Nye* v. *Moseley*, 6 Barn. & Cress. 133; *S. C.* 9 Dowl. & Ryl. 165. So that the distinction taken in the case of *Pricst* v. *Parrot*, *ante*, p. 332, may now be considered as over-ruled].

So, it seems, that equity will not, in any case, relieve the obligor on his own application: as where he had seduced his wife's sister, and had several children by her, and had given her a bond for payment of money, as a provision for her and the children; the bond being put in suit against him, he brought a bill, suggesting that the bond was not given for money lent, or any valuable consideration; Lord *Somers* decreed the payment of

Equity will not in any case relieve the obligor, on his own application.

chase money, notwithstanding.

fant] of and in the said purchase or consideration money in the said indenture of release expressed to be paid to him, was paid to him, notwithstanding his infancy, with the consent of the said [J. C.], [W. C.], [J. R.], [H. R.], and [*infant*]. AND WHEREAS, upon the treaty for the purchase

Recital of agreement, that obli-

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what was due on the bond, for principal and interest, with costs, by a short day, or else the bill to be dismissed with costs: and his Lordship said, it was a pity he could do no more. *Spicer* v. *Hayward*, Prec. Chan. 114; 1 Fonbl. Treat. of Equity, 229.

These bonds being voluntary, equity will postpone the payment of them out of the personal estate until all the other creditors, whether by bond or simple contract, are paid; but if the personal estate falls short, then they must be paid out of the real estate, if any.

These bonds being merely voluntary, even though *præmium pudicitiæ*, the payment of them out of the personal estate will be postponed by a Court of equity, until all the other creditors, whether by bond or simple contract, are paid; but if the personal estate falls short, then they must be paid out of the real estate, if there be any. *Jones* v. *Powell*, 1 Eq. Ca. Abr. 84, pl. 2; *Cray* v. *Rooke*, Ca. Temp. Talbot, 153; *Harris* v. *Marchioness of Annandale*, 2 P. Wms. 432, 3 Bro. Par. Ca. 445; 1 Eq. Ca. Abr. 87, pl. 6, *S. C.* Thus, where A. having a wife who lived separate from him, afterwards courted and *married* another woman, who knew nothing of the former wife's being alive; but it being discovered to the second wife, that the former was alive, A., in order to prevail with the second wife to stay with him, some years afterwards gave a bond to a trustee for the second wife, to leave her 1,000*l.* at his death, and died, not leaving assets to pay his simple contract debts; Sir *Joseph Jekyll* held, that, if this bond had been given immediately on the discovery, and they had parted thereupon, it had been good; but being given in trust for the second wife, after such time as she knew the first wife was living, and to induce her to continue with A. this was worse than a voluntary bond, and decreed to be postponed to all the simple contract debts. Lady *Cox's* case, 3 P. Wms. 339; 2 Eq. Ca. Abr. 182, pl. 6, 258, pl. 13. So, where there was a bond by S. G., upon articles, in consideration of 10*l.*, which imported a direct assignment by Mr. H. of his wife, who was herself a party, *to the use* of S. C.; with covenants for quiet enjoyment, and further assurance; upon a bill to have this bond postponed, and to be relieved against an assignment and bill of sale of goods made by S. G. in trust, and for the benefit of Mrs. H.; as to creditors, the bond and bill of sale were set aside, because they appeared to be for undue consideration. *Robinson* v. *Gee*, 1 Ves. 254. But a bond of this kind must be paid before legacies; for, although voluntary, yet it transfers a right in the life of the obligor, and legacies arise only from the will, which takes effect only from the testator's death, and therefore ought to be postponed to a right created in the testator's life-time. *Fairebeard* v. *Bowers*, 2 Vern. 202; Prec. Chan. 17, *S. C.* *Jones* v. *Powell*, 1 Eq. Ca. Abr. 143,

A voluntary bond must be paid before legacies.

of the said freehold and copyhold hereditaments by the said [*purchaser*], it was agreed, that the said [J. C.], [W. C.], [J. R.], and [H. R.], should, by their bond, in the penalty of [*double the sum paid to the infant*] pounds, guaranty unto the said [*purchaser*], his heirs, appointees,

gors should give bond to guaranty infant's confirmation, and covenant to surrender premises, or of his part therein:

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pl. 15, 16; Gilb. Chan. 297, 298; *Cray* v. *Rooke*, Cas. Temp. Talbot, 155: 2 Eq. Ca. Abr. 182, pl. 7.

Equity will not compel the party, or his executors, to fulfil an agreement to provide for a kept mistress.

But the bond or deed must be executed; for in matters *executory*, even on the consideration *præmium pudicitiæ*, the Court of Chancery will not compel the party, or his executors, to fulfil an agreement to provide for a forsaken kept mistress. *Whaley* v. *Norton*, 1 Vern. 483. Thus, a general demurrer was allowed to a bill against the widow and executrix of the testator, to enforce an agreement by him when single, first by a letter to the plaintiff, and afterwards by a parol agreement with her, to settle an annuity on the plaintiff, who was separated from her husband, and a deed of separation was executed by them, in which the husband gave up all claim to any property the plaintiff might acquire. After this separation, the plaintiff was induced to live with the testator, and lived with him for several years; when he, being about to marry, communicated his intention to a lady, a friend of the plaintiff, requesting her to break the matter to the plaintiff, and expressing an intention to settle upon her 100*l.* a-year. The testator wrote afterwards to the plaintiff, inclosing her 25*l.*, which he said, "I look upon as a quarter of the annuity I intend securing to you for your life, which shall be regularly paid at the four usual quarters. I shall send you 50*l.* in the course of a few days, and will send you the same sum at Christmas, to purchase what you may have occasion for to make you comfortable." In consequence of the proposal of the annuity, it was finally agreed between the plaintiff and the testator, that the connection should cease, and that the plaintiff should not in any respect impede or endeavour to prevent the intended marriage with the defendant; and that the plaintiff should in future live a retired, chaste, and virtuous life, and should so conduct herself as in no respect to interfere with the connection by way of marriage, which the testator was about to form; every one of which stipulations the plaintiff performed; and the testator promised or agreed to settle upon the plaintiff 100*l.* *per annum* for life. Sir *Thomas Plumer*, Vice-Chancellor, said,—This bill states only an agreement to secure an annuity, and that agreement was not founded on any good, meritorious, or valuable consideration; it was therefore voluntary, and I take it to be a clear rule in this Court, that a bill does not lie to enforce a voluntary agreement. It has been contended, that there was a moral obligation to provide for this woman. Did that moral obligation arise in respect of the past adulterous intercourse? Certainly not. Though separated from

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and assigns, a confirmation of the conveyance and assurance, and covenant for the surrender and assurance by the said recited indenture of release, expressed to be made by the said [*infant*], of the said freehold and copyhold hereditaments, or of the part, share, estate, and interest of the

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her husband, she was not absolved from her marital obligation to live chastely; and her connection with the testator was a high offence by the divine law, as well as against society. Whether, if any annuity had been settled, the Court would take it from her; or whether the Court would refuse her any assistance, as in *Priest* v. *Parrot*, it is not necessary to consider. *Matthews* v. *L———e*, 1 Madd. Rep. 558, 563.

If there be any fraud practised on a woman seduced, in relation to a security, *præmium pudicitiæ*, equity will afford relief.

But if there be any *fraud* practised on the unfortunate woman, a Court of equity would afford her relief. Thus, where a man having debauched a young woman, and intending afterwards to deceive her, made a settlement upon her of 30*l.* a-year for life, out of an estate which was not his; the Court decreed him to make it good out of an estate which he had of his own; and this decree was afterwards affirmed on appeal to the House of Lords. *Carew* v. *Safford*, 1 Eq. Ca. Abr. 31, pl. 4. And where Sir W. B., having seduced Mrs. O, then a young lady of about fourteen years of age, of a good family, and entitled to 12,000*l.* fortune, settled on her 300*l.* *per annum* for years; but the estate was incumbered, and, Mrs. O. dying, her administrator brought a bill in order to disincumber the land which was charged with this annuity, and was relieved accordingly. *Ord* v. *Blacket*, cited in *Marchioness of Annandale* v. *Harris*, 1 Eq. Ca. Abr. 87, pl. 6; 2 P. Wms. 433; 19 Vin. Abr. 303, pl. 2.

As "equity relieves against accidents," it seems that, if the obligee of a voluntary bond lose it by accident, he may have remedy against the obligor in equity.

Under the maxim, that "equity relieves against accidents," Grounds and Rudiments of Law and Equity, 87, it seems, if the grantee in a voluntary deed, or the obligee in a voluntary bond, lose the deed or bond by accident, they may have remedy against the grantor or obligor in equity. *Underwood* v. *Staney*, 1 Ch. Ca. 78; 13 Vin. Abr. 104, pl. 4; 20 Vin. Abr. 101, pl. 2; Lat. 24; 2 Ch. Ca. 30. Though 1 Eq. Ca. Abr. 92, pl. 4, adds, "*Quære*, for these matters are discretionary:" and there certainly are some old cases *contrà*. *Miller* v. *Reames*, 1 Roll. Abr. 375, *Chancerie* (Q) pl. 1; *Vincent* v. *Beverlye*, Noy, 82; Pop. 205, 206. See *Toulmin* v. *Price*, 5 Ves. 235. Though, in a more modern case, where J. S., a little before his death, granted an annuity of 30*l.* *per annum* to his housekeeper, and entered into a voluntary bond for payment of the annuity, and the bond being lost, his representatives were decreed to pay the annuity, or the penalty of the bond, though it appeared that there were no wages due to her, service alone being a consideration; and no *turpis contractus* shall be presumed, unless proved. *Lightebone* v. *Weedesh*, 1 Eq. Ca. Abr. 24, pl. 7; *Ibid.* 93, pl. 5.

said [*infant*] therein: *And* should, in the mean time, secure unto the said [*purchaser*], his heirs, appointees, and assigns, the quiet possession and enjoyment of the same freehold and copyhold hereditaments, as against the said [*infant*], and his heirs, and those claiming under him

and in mean time secure to purchaser quiet possession, as against infant, his heirs, and those claiming

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3rd. *Præmium concubinati.*

3rd. *Præmium concubinati.*

Though a Court of law will not inquire into the consideration of a bond, yet, if it appear to be illegal on the face of it, the Court cannot sanction the claim: thus a bond, reciting that the parties had agreed to *live together*, therefore the obligor had agreed to find the woman meat, drink, washing, lodging, &c., and to leave her an annuity of 60*l.* a-year if *he* quitted her, or she outlived him: and if they had any child, he was to take care of and provide for it. But if *she* should leave him, or go to another man, then he should *not* be obliged to provide for her any longer, or leave her any annuity. Lord *Mansfield* said, it is the price of prostitution, *præmium prostitutionis:* for, if she *becomes virtuous*, she is to *lose* the annuity. It appears clearly, upon the condition, that the bond is illegal and void. *Walker* v. *Perkins*, 3 Burr. 1568.

Bond for cohabitation with a woman seduced by obligor, and for maintenance after his death, void in law.

But after a verdict at law upon a bond *præmium concubinati*, against the obligor, a demurrer was allowed to a bill to have it delivered up, charging the consideration to have been an agreement by the defendant to cohabit with the plaintiff as his wife; and that she had lived in a state of adultery and incontinence with various persons, and praying a discovery. *Franco* v. *Bolton*, 3 Ves. 368.

After a verdict at law on a bond, *præmium concubinati*, a demurrer was allowed to a bill to have it delivered up.

VI. Bonds for Gaming Debts.

Bonds for gaming debts.

By the 9th Ann. c. 14, all *bonds* and *other securities*, given for money won at play, or money lent at the time to play with, are utterly void. See further, 4 Bla. Com. 172. 1 Fonbl. Treat. of Equity, 233. Horse-racing is gaming within the 9th Ann. *Blaxton* v. *Pye*, 2 Wils. 309. *Clayton* v. *Jennings*, 2 Wm. Bla. 706; *Ximenes* v. *Jacques*, 6 Durnf. & East, 499; *Whaley* v. *Pagot*, 2 Bos. & Pull. 51. But a man has been allowed to recover money which he had lent to the defendant to game with, and at the same time won it of him; for the word *contract* was not mentioned in the statute 9 Ann. c. 14. *Barjean* v. *Walmsley*, 2 Str. 1249. So, where plaintiff lent defendant money to bet at a horse race, he was allowed to recover. *Aleinbrook* v. *Hall*, 2 Wils. 309. See also *Wettenhall* v. *Wood*, 1 Esp. N. P. Ca. 18. *Robinson* v. *Bland*, 1 Bla. 234, 256. 2 Burr. 1077. *Faikney* v. *Reynous*, 4 Burr. 2069. *Aubert* v. *Maze*, 2 Bos. & Pul. 371.

under him or them, or his mother deceased. And to effect such guaranty, obligors have given above bond.

or them, or [*mother*], his mother deceased, in manner hereinafter mentioned: AND in pursuance of such agreement, and for the purpose of effectuating such guaranty and security, the said [J. C.], [W. C.], [J. R.], and [H. R.], have entered into the above-written bond or obligation.

Of relief on an illegal transaction, where the claimant is particeps criminis.

VII. OF RELIEF AT LAW, AND IN EQUITY, ON AN ILLEGAL TRANSACTION, WHERE THE CLAIMANT IS PARTICEPS CRIMINIS.

1st. *At law*:—

At law, *particeps criminis* cannot recover money he paid freely.

Where a man pays money on a mistake in an account, or where one pays money under or by a mere deceit, or if one recovers money *malâ fide*, by suit in an inferior Court, he may bring *indebitatus assumpsit* for the money. *Moses* v. *Macfarlan*, 2 Burr. 1005. 1 Bl. Rep. 219, *S. C.* But where one *knowingly* pays money upon an illegal consideration, or where the act is in itself immoral, or a violation of the general laws of public policy, he is *particeps criminis*, and he shall not have this action, for he parted with his money freely, and *volenti non fit injuria*. *Tomkins* v. *Bernet*, 1 Salk. 22, Skin. 411, *S. C.* For, where both parties are equally offenders against such laws, *potior est conditio defendentis; Smith* v. *Bromley*, Doug. 698; not because the defendant is more favoured, but because the plaintiff must draw his justice from pure fountains. Therefore, though if A. agree to give B. money for doing an illegal act, as, if a wager be made on a boxing match, B. cannot (though he do the act) recover the money by an action; yet if the money be paid, A. cannot recover it back again. *Webb* v. *Bishop*, Bull. N. P. 132, 7th ed. See *Lacaussade* v. *White*, 7 Durnf. & East, 535; *Howson* v. *Hancock*, 8 Durnf. & East, 575; *Vandyck* v. *Hewitt*, 1 East, 96.

2nd. *In Equity*:

Equity extends relief to *particeps criminis*, on grounds of public policy.

Equity extends relief to *particeps criminis*, on grounds of public policy; *Hatch* v. *Hatch*, 9 Ves. 292, 299; *Shirley* v. *Martin*, cited 1 Ball & Bea. 358, 359; 3 P. Wms. 75; 1 Fonbl. Treat. Equity, 264, (*s*); 11 Ves. 536, 537; 9 Ves. 299; therefore, it is no objection that the plaintiff himself was a party in the illegal transaction; because the public interest requiring that relief should be given, it is given to the public through the plaintiff, though he be himself *particeps criminis*. Lord *St. John* v. Lady *St. John*, 11 Ves. 535, 536. Thus, A., by his interest with the Commissioners of the Excise, got an office in that branch of the revenue for B., who, in consideration thereof, gave a bond to A. to pay him 10*l. per annum*, as long as B. enjoyed the place; equity relieved against the bond. *Law* v. *Law*, 3 P. Wms. 391; Cas. Temp. Talb. 140; 2 Eq. Ca. Abr. 187, pl. 10. So, money advanced by the plaintiff to the defendant to procure him a commission in the marines, was decreed to be refunded with

NOW THE CONDITION of the above-written obligation is such, that, if the said [*infant*], his heirs (*b*), executors, and administrators, and every other person claiming, or to claim, by, from, through, or under him, them, or any of them, or by, from, through, or under the said [*mother*], *his mother, deceased, shall and do, within six calendar months next after the said [*infant*] shall attain the age of twenty-one years; *Or*, in case of his decease under that age, if the heirs, executors, and administrators of, or other person or persons claiming, or to claim by, from, through, or under him, or the said [*mother*], deceased, shall and do,

Condition if infant, and those claiming through him, or his mother deceased, should, within six months after he attains 21;

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or in case of his previous death, if his heirs, &c., or those claiming through him, or his mother,

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interest, the plaintiff having, after six months, been discovered to have worn a livery, and being thereupon discharged: first, upon grounds of public policy; and secondly, as the plaintiff had been imposed upon, the defendant knowing that he was incapable of holding the commission. *Morris* v. *M'Cullock*, Ambl. 432; 2 Eden, 190, *S. C.* A private agreement obtained by a father from his son, in derogation of an allowed sale of the command of a post-office packet, by the father to the son, duly registered in the name of the son, upon a promise by the officers of the post-office, that, if he would convey the vessel to the son, they would appoint the son commander of the packet in the room of his father, on a bill filed by the widow and executrix of the son against the executors of the father, an account was decreed. Sir *William Grant* said, That the agreement which is impeached by this bill was illegal, as being a fraud upon the post-office, cannot be doubted after the cases of *Hartwell* v. *Hartwell*, 4 Ves. 811; *Thompson* v. *Thompson*, 7 Ves. 470; and more particularly *Parsons* v. *Thompson*, 1 Hen. Bla. 322; *Garforth* v. *Fearon*, Ibid. 327. I think it illegal also, upon the ground of its being a fraud on the provisions of the ship-registry acts, stat. 26 Geo. 3, c. 60; stat. 34 Geo. 3, c. 68. The father, therefore, could never have enforced it; but my doubt was, whether, the father having received the profits, this Court would decree them to be accounted for, and refunded; or whether the general rule, that *in pari delicto melior est conditio possidentis*, should prevail, as both are guilty of a violation of the law. Upon an examination of the cases, however, I think the plaintiffs are entitled to the relief sought by the bill. Courts, both of law and equity, have held, that two parties may concur in an illegal act, without being deemed to be in all respects *in pari delicto*. I consider this agreement as substantially the mere act of the father. He put up to sale a situation, which the young man would naturally be de-

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(*b*) This is inserted because the infant may die after attaining twenty-one, and before the end of six months.

should, on being competent so to do (at the costs of infant, his heirs, &c.) convey and surrender to purchaser, his heirs, &c., infant's share of the freehold and copyhold premises, free from all incumbrances by infant, his heirs, &c., or his mother;

immediately after such heirs, executors, or administrators, or other person or persons, shall be competent at law so to do by good and sufficient conveyances, surrenders, and assurances in the law, to the good liking and satisfaction of the said [*purchaser*], his heirs, appointees, or assigns, or his or their counsel in the law, (but at the costs and charges of the said [*infant*], his heirs, executors, or administrators, well and effectually convey, surrender, release, and assure, unto the said [*purchaser*], his heirs, appointees, and assigns, or otherwise, as he or they shall direct or appoint; *All* the part and share in fee simple,

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sirous of obtaining, and could obtain only upon the terms prescribed by his father. In the case of *Morris* v. *M'Cullock*, Amb. 432, the parties were more independent of each other; yet the money paid was decreed to be returned. In *Goldsmith* v. *Bruning*, 1 Eq. Ca. Abr. 89, pl. 4, a marriage-brocage case, the party obtaining money by the sale of her influence must have been considered as more criminal than the purchaser; for she was decreed, first at the Rolls, and afterwards upon appeal, to refund the sum which she had received. There is no case calling in question that decision. Lord *Thurlow*, indeed, in *Neville* v. *Wilkinson*, 1 Bro. C. C. 543 (see 547, 548, and Eden's notes), seems to have thought, that, in all cases where money was paid for an illegal purpose, it might be recovered back; observing, that "if Courts of justice mean to prevent the perpetration of crimes, it must be not by allowing a man, who has got possession, to remain in possession, but by putting the parties back to the state in which they were before." It is, however, unnecessary, in the present case, to lay down so broad a rule. These parties are not, I think, *in pari delicto*, by entering into this illegal agreement. It was not confirmed, if indeed it admitted confirmation, by signing the account. The account must, therefore, be taken as if the son had been, from the beginning, the actual owner of the packet, and entitled to all its earnings. As the plaintiff chooses to open the account, the defendants are not bound by any deductions which they agreed to make, if they can establish a right to the sums deducted. *Osborne* v. *Williams*, 18 Ves. 379.

The profits of partnership in underwriting, made illegal by 6 Geo. 1, cannot be recovered at law, or be the subject of account in equity.

The profits of a partnership in underwriting, made illegal by the stat. 6 Geo. 1, c. 18, s. 12; [but as to which, see 6 Geo. 4, c. 91], cannot be recovered at law; *Sullivan* v. *Greaves*, Park's Insurance, 8; *Michell* v. *Cockburn*, 2 Hen. Bla. 379; nor be the subject of account in equity. *Knowles* v. *Haughton*, 11 Ves. 168; *contrà*, *Watts* v. *Brooks*, 3 Ves. 612; but now over-ruled.

estate, right, title, and interest of the said [*infant*], in and to the said freehold and copyhold lands, tenements, *and hereditaments, mentioned and comprised in the said recited indenture of release, bearing even date with the above-written bond, and expressed to be thereby granted and released, and covenanted to be surrendered, freed and discharged of and from all incumbrances previously made, done, or suffered by the said [*infant*], his heirs, executors, or administrators, or the said [*mother*], deceased: AND ALSO, if, in the mean time, and until such conveyance, surrender, release, and assurance shall be made and executed by the said [*infant*], his heirs, executors, or administrators, or those claiming through or under him or them, or the said [*mother*], deceased, as aforesaid; the said [*purshaser*], his heirs, appointees, and assigns, shall and do, from time to time, and at all times, peaceably and *quietly have, hold, occupy, possess, and enjoy the said freehold and copyhold hereditaments mentioned and comprised in the said recited indenture of release, and expressed to be thereby granted and released, and covenanted to be surrendered and assured, with their appurtenances, without any let, suit, trouble, denial, eviction, interruption, or disturbance of, from, or by the said [*infant*], his heirs, executors, administrators, or assigns, or any person or persons claiming, or to claim, by, from, through, or under him, or them, or any of them, or by, from, through or under the said [*mother*], deceased; *Then* the above-written obligation shall be void; but otherwise shall remain in full force.

FOR CONVEYANCE BY INFANT, OR HIS HEIRS, &c. AND FOR QUIET ENJOYMENT IN MEAN TIME.

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and if in mean time, the purchaser, his heirs, &c., should quietly enjoy the premises, without any interruption from infant, his heirs, &c., or those claiming through him or them, or through his mother;

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then obligation to be void.

THAT FOUR INFANTS SHALL CONVEY, ON SEVERALLY COMING OF AGE.

BOND *on a Conveyance by Devisees in Trust for Sale, to a Purchaser, that the Devisor's Four Infant Sons, who are beneficially interested in the Purchase Money, shall severally, on attaining Twenty-one, convey to the purchaser.*

Obligation from two to one, jointly and severally.

BOND from [*obligor*], of &c., and [*obligor*], of &c., widow, to [*purchaser*], of &c., (*in double the amount of the infants' shares of the purchase money*) pounds, jointly and severally, *ut ante*, p. 179.

Recital of lease and release by the obligors and two other devisees in trust for sale:

WHEREAS by indentures of lease and release, the lease bearing date the day next before the day of the date of the above-written obligation, and the release bearing even date herewith, and made or mentioned to be made, between the above-bound [*two obligors*], and [*two other trustees*], (devisees and executors, named in the last will and testament of [*testator*], late of &c., deceased) of the one part, and the above-named [*purchaser*], of &c., of the other part; *After reciting* that the said [*testator*], in and by his last will, &c. *It was* by the said indenture of release, *witnessed*, that *(state the conveyance shortly.)*

and that by release, the obligors have covenanted for further assurance by themselves, and those claiming under them, or under the testator.

AND the said [*two obligors*] have, by the said indenture of release, covenanted with the said [*purchaser*], that they the said [*obligors*], or either of them, and all and every other persons or person having or claiming any legal or equitable estate or interest of or in the said premises, or any part thereof, by, from, or under them, the said [*obligors*], or either of them, or the said [*testator*], deceased, in anywise, shall and will, from time to time, and at any time or times hereafter, upon the reasonable request, and at the

[*345] *proper costs and charges in the law of the said [*purchaser*], his heirs and assigns, make, do, acknowledge, levy, suffer, and execute, or cause or procure to be made,

done, acknowledged, levied, suffered, and executed, all such further and other lawful and reasonable acts, deeds, and things, devices, conveyances, and assurances in the law whatsoever, for the further, better, more perfectly and absolutely granting, releasing, conveying, assuring, and confirming, unto and to the use of the said [*purchaser*], his heirs and assigns, the said premises, and every part thereof.

THAT FOUR INFANTS SHALL CONVEY, ON SEVERALLY COMING OF AGE.

NOW THE CONDITION of the above-written obligation is such, that, if the said [*four infants*], the sons of the said [*testator*], deceased, severally, do and shall, after their severally attaining their respective ages of twenty-one years, upon the request, and at the proper costs and charges in the law, of the said [*purchaser*], his heirs, or assigns, by good and sufficient conveyances and assurances in the law, grant, and release and convey, unto and to the use of the said [*purchaser*], his heirs or assigns, the said hereditaments and premises comprised in the said indenture of release, and all the estate, right, title, interest, property, claim, and demand whatsoever, both at law and in equity, of them the said [*four infants*], the sons, and of each of them, of, in, to, and out of the same, and every part thereof; *Then* the above-written bond or obligation shall be void; but otherwise shall be and remain in full force and virtue.

Condition that four of the *cestuis que trust*, sons of the devisor, shall severally, on attaining 21, convey to purchaser.

TO PROCURE TRUSTEE'S HEIR TO CONVEY LEGAL ESTATE, OR TO REPAY PURCHASE MONEY.

BOND *from a Vendor to a Purchaser, that he will, at his own Expense, within —— months, procure the Heir or Co-heirs of a Trustee to convey the Legal Estate to the Purchaser: Or, if the Vendor should not be able to procure such Conveyance, then that he will repay the Purchase Money, at the end of such —— Months, on having the Premises re-conveyed; freed from all Incumbrances by the Purchaser, and from all manner of Waste, Spoil, and Damage: and that the Purchaser shall be permitted to receive the Rents, in lieu of Interest, till the Conveyance of the Legal Estate, or Repayment of the Purchase Money,*

Obligation from one to one.

BOND from [*vendor*], of &c., to [*purchaser*], of &c., in the sum of [*double the purchase money*] pounds, *ut ante*, p. 179.

Recital of conveyance to purchaser: agreement that vendor would, at his own expense, within —— months, procure the heir or co-heirs of trustee to convey legal estate of premises sold to purchaser in fee:

WHEREAS &c., (*recite the conveyance to the purchaser*). AND WHEREAS the said [*vendor*] did, at the time of the execution of the said in part recited indentures of lease and release, agree, that he the said [*vendor*], his heirs, executors, or administrators, would, at his or their own expense, within the space of —— months, to be computed from the day of the date of the said recited indenture of release, procure the said [*two co-heirs of trustee*], or the heir or co-heirs at law for the time being of the said [*trustee*], by good and sufficient deed or deeds, fine or fines, common recovery or common recoveries, or such conveyances and assurances in the law, to be approved by the said [*purchaser*], his heirs or assigns, or his or their counsel, to convey and assure the legal estate and inheritance of and *in the said lands and hereditaments mentioned and comprised in the said in part recited indentures of

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lease and release, unto and to the use of the said [*purchaser*], his heirs and assigns for ever, to and for his and their own use and benefit; or unto such person or persons as he or they should direct or appoint; *Or*, in case he the said [*vendor*], his heirs, executors, or administrators, should not be able, within the time aforesaid, to procure the said [*two co-heirs of trustee*], or the person or persons who for the time being should be the heir or co-heirs at law of the said [*trustee*], to join in making such conveyance of the legal estate and inheritance of and in the said hereditaments and premises as aforesaid, that he the said [*vendor*], his heirs, executors, or administrators, would, at the end of such —— months, repay, or cause to be repaid unto the said [*purchaser*], his executors, administrators, or assigns, the said sum of [*purchase money*] pounds, as and for the repurchase of the said hereditaments and premises, upon having the same re-conveyed to him the said [*vendor*], his heirs or assigns, or to such person or persons as he or they should direct or appoint, in manner hereinafter mentioned. AND the said [*vendor*] did also agree, that the said [*purchaser*] should be let into the immediate receipt of the rents and profits of the said hereditaments and premises so conveyed to or in trust for him as aforesaid: *And* that such rents and profits should, in the event of the said consideration money, or sum of [*purchase money*] pounds being repaid as aforesaid, be retained by the said [*purchaser*], his executors, administrators, or assigns, in lieu or stead of any interest on the said sum of [*purchase money*] pounds.

TO PROCURE TRUSTEE'S HEIR TO CONVEY LEGAL ESTATE, OR TO REPAY PURCHASE MONEY.

or in case vendor should not be able so to procure such heir or co-heirs of trustee to join in making such conveyance, that vendor would, at the end of such —— months, repay purchase money, upon having premises re-conveyed:

that purchaser should be let into immediate receipt of rents:

and retain same in lieu of interest, if purchase money should be repaid:

NOW THE CONDITION of the above-written bond or obligation is such, that, if the above-bounden [*vendor*] shall and do, at his or their own expense (within the space of —— months, to be computed from the date of the said hereinbefore in part recited indenture of release) procure the said [*two co-heirs of trustee*], or the person or persons who for the time being shall be the heir or co-heirs at law of the said [*trustee*], by such good and sufficient deed or deeds, fine or fines, common recovery or common * recoveries, conveyances and assurances in the law, as the said [*purchaser*], his heirs or assigns, or his or their coun-

Condition if vendor should, at his own expense, within —— months procure heir or co-heirs of trustee to convey legal estate to purchaser:

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TO PROCURE TRUSTEE'S HEIR TO CONVEY LEGAL ESTATE, OR TO REPAY PURCHASE MONEY.

sel shall advise, to convey and assure the legal estate and inheritance of and in the said lands and hereditaments hereinbefore particularly mentioned and described, and comprised in the said hereinbefore in part recited indentures of lease and release, unto and to the use of the said [*purchaser*], his heirs and assigns, to and for his and their own use and benefit, or unto such person or persons as he or they shall direct or appoint: Or in case the said [*vendor*], his heirs, executors, or administrators, shall not be able to procure the said [*two co-heirs of trustee*], or the person or persons who for the time being shall be the heir or co-heirs at law of the said [*trustee*], to convey and assure the same premises, within the space of —— months from the day of the date of the said indenture of release, unto and to the use of the said [*purchaser*], his heirs and assigns for ever, to and for his and their own use and benefit, or unto such person or persons as he or they shall direct or appoint; *Then*, if the said [*vendor*], his heirs, executors, or administrators, or any of them, shall and do well and truly pay, or cause to be paid, at the end of such —— months, unto the said [*purchaser*], his executors, administrators, or assigns, some or one of them, the sum of [*purchase money*] pounds of lawful money of Great Britain and Ireland, without any deduction or abatement whatsoever, as and for the re-purchase of the said lands and hereditaments in and by the said hereinbefore in part recited indentures of lease and release conveyed and assured unto and to the use of, or in trust for, the said [*purchaser*], his heirs and assigns, for ever, upon having the same hereditaments and premises, and every part and parcel thereof (at the request, costs, and charges of the said [*vendor*], his heirs or assigns), re-conveyed and assured unto and to the use of the said [*vendor*], his heirs or assigns, or unto such person or persons as he or they shall direct or appoint, by the said [*purchaser*] and [*his trustee to prevent dower*], their heirs or assigns, or the person or persons claiming, or who shall or may claim any estate, right, title, trust, or interest of, in, to, or out of the said hereditaments and premises, or any part or parcel thereof, by, from, under, or in trust for them, *either, or any of them; *Freed* and discharged of and from all and all manner of incumbrances

or if vendor should not be able to procure such conveyance, then if he should repay purchase money at the end of such — months, on having premises reconveyed:

[*349] freed from all incumbrances by

whatsoever in the mean time, to be made, done, or committed by them, either, or any of them; *And also* from all and all manner of waste, spoil, and damage to be done to the said lands, hereditaments, and premises, or any part or parcel thereof, by them, either, or any of them: AND ALSO if the said [*purchaser*], his heirs or assigns, shall be permitted to receive and take the rents, issues, and profits of the said lands, hereditaments, and premises so conveyed to, or in trust for him and them as aforesaid, from the —— day of —— up to the time the legal estate and inheritance of and in the said lands and hereditaments shall be conveyed and assured unto and to the use of the said [*purchaser*], his heirs and assigns for ever; or as he or they shall direct or appoint as aforesaid; or up to the time the said sum of [*purchase money*] pounds shall be repaid by the said [*vendor*], his heirs, executors, or administrators, unto the said [*purchaser*], his executors, administrators, or assigns as aforesaid, without any molestation, interruption, or disturbance whatsoever; *Then* the above-written bond or obligation shall be void, or else shall remain, continue, and be in full force and virtue.

TO PROCURE TRUSTEE'S HEIR TO CONVEY LEGAL ESTATE, OR TO REPAY PURCHASE MONEY.

purchaser; and from all manner of waste, spoil, and damage; and if purchaser should be permitted to receive the rents till conveyance of legal estate, or repayment of purchase money;

bond to be void.

FOR QUIET ENJOYMENT; OR RETURN OF PURCHASE MONEY, IF EVICTED.

BOND *from a Vendor to a Purchaser, for quiet Enjoyment of Freehold and Leasehold Property, or a Return of the Purchase Money in Case of Eviction.*

Obligation from one to one.

BOND from [*vendor*], of &c., to [*purchaser*], of &c., in the sum of [*double the amount of the purchase money*] pounds, *ut ante*, p. 179.

Recitals.

WHEREAS &c., (*recite will of testator; death, and proof of will; lease and release, and assignment to purchaser; and agreement for bond, ut post*, p. 356.)

Condition, if purchaser, his heirs, executors, &c., should for ever hereafter, in respect of freehold, and during continuance of terms in respect of leasehold, peaceably enjoy,

NOW THE CONDITION of the before-written obligation is such, that, if the said [*purchaser*], his heirs, executors, administrators, and assigns, do and shall, according to the different natures and tenures of the said messuage or tenement, and premises, so purchased by him, the said [*purchaser*], as aforesaid, from time to time, and at all times for ever hereafter, in respect of the freehold parts thereof, and during the continuance of the aforesaid terms in respect of the said leasehold parts thereof, peaceably and quietly have, hold, occupy, possess, and enjoy all and singular the said freehold and leasehold hereditaments and premises so purchased by him as aforesaid, and every part and parcel thereof, with their and every of their rights privileges, members, and appurtenances; and receive and take the rents, issues, and profits thereof, and of every part thereof, to and for his and their own proper use and benefit, without any let, suit, trouble, molestation, eviction, ejection, interruption, denial, or disturbance whatsoever, of, from, or by the said [E. F.] and [G. H.], or either of them, or either of their assigns; or of any other person or persons claiming, or to claim, by, from, through, or under them, or either of them; or of, from, or by any

and receive the rents, without any interruption from certain persons:

person or persons claiming or to claim any estate, right, title, or interest, at law or in equity, in, to, or out of the same premises, or any part thereof, under or by virtue of the limitations in the said recited will of the said [*testator*], deceased, to the first and other sons of the body of the said [I. K.], in tail male, and to all and every the daughter and daughters of the body of the said [I. K.], in tail general, as aforesaid; or under or by virtue of any or either of the limitations, or any other of the limitations, uses, trusts, matters, and things contained in the will of the said [*testator*]; or by, from, through, or under the said [*testator*], or his estate: OR, if the said [*purchaser*], his heirs, executors, administrators, or assigns, shall be evicted from, or be dispossessed of, the said premises, or any part thereof, either for the whole, or any part of the estate or interest so purchased by him as aforesaid, by reason or means, or in consequence of any ejectment or ejectments, action or actions, suit or suits at law or in equity, or other proceeding or proceedings, claim or demand, claims or demands, whatsoever, at any time or times hereafter to be brought, commenced, prosecuted, made, or set up by the said [E. F.] and [G. H.], or either of them, their, or either of their assigns; or by any person or persons claiming, or to claim, by, from, through, under, or in trust for them, or either of them; or by any person or persons claiming or to claim any estate, right, title, or interest, at law or in equity, in, to, or out of the same premises, or any part thereof, under or by virtue of the limitations to the issue of the said [I. K.], hereinbefore mentioned, either, or any of them; or any other of the limitations, uses, trusts, matters, or things, contained in the said will of the said [*testator*]; or by, from, through, or under the said [*testator*], or his estate, or in any wise in relation thereunto; *Then*, if the said [*vendor*], his heirs, executors, administrators, or assigns, shall and do, upon demand, and upon a conveyance being made by the said [*purchaser*], his heirs, executors, administrators, and assigns, unto the said [*vendor*], his heirs, executors, administrators, and assigns, or as he or they shall direct, of so much, and such part and parts, if any, of the said freehold and leasehold premises, as shall then remain vested in the said [*purchaser*], his heirs, executors,

FOR QUIET ENJOYMENT; OR RETURN OF PURCHASE MONEY, IF EVICTED.

or if purchaser, or his heirs, &c., should be evicted from the whole, or any part of the estate, by any of such persons;

then if vendor, his heirs, &c., should, on demand, and on a re-conveyance being made by purchaser, his heirs, &c., of residue (if any), of premises, free from all incumbrances by him or them, well and truly

FOR QUIET ENJOYMENT; OR RETURN OF PURCHASE MONEY, IF EVICTED.

administrators, or assigns, after such eviction as aforesaid; or of or from which, he or they shall not be evicted or dispossessed as aforesaid, free from all charges and incumbrances made, done, committed, or suffered by him or them (the expenses of such conveyance to be paid by the said [*vendor*], his heirs, executors, or administrators), well and truly pay, or cause to be paid, unto the said [*purchaser*], his executors, administrators, or assigns, the said sum of [fifteen thousand] pounds, so paid by him for the purchase aforesaid; and all costs, charges, and expenses, which shall be incurred by him or them, in defending any such action or suit, actions or suits, as aforesaid; *Then* the above-written obligation shall be void, but otherwise shall remain in full force.

pay purchaser, his executors, &c., purchase money, and all costs in defending possession:

bond to be void.

FOR QUIET ENJOYMENT, WHERE TITLE WAS TOO RECENT.

BOND *for quiet Enjoyment, where the Title commenced at too late a Period.*

Obligation from one to one.

BOND from [*vendor*], of &c., to [*purchaser*], of &c., in the sum of [*double the purchase money*] pounds, *ut ante*, p. 179.

Recital of conveyance to purchaser: of commencement of title:

WHEREAS (*recite a conveyance of a piece of land to the purchaser*, to uses, *to prevent dower.*) AND WHEREAS the title to the said purchased premises [originally] produced by the said [*vendor*] to the said [*purchaser*], commenced with an indenture bearing date the —— day of ——, 17—, being, or purporting to be a conveyance in fee simple of the said premises, to [T. B.] gentleman.

that an objection was made because it commenced too recently;
that vendor, not being able to produce earlier title, offered to give this bond.

AND WHEREAS an objection was made, on the part of the said [*purchaser*], to the title of the said [*vendor*], to the said purchased premises, because it commenced at too recent a period; *And* the said [*vendor*], not being able to produce satisfactory evidence of the earlier title, he the said [*vendor*] offered and proposed, in order to induce the

said [*purchaser*] to complete the said purchase, to execute, and give to him, the said [*purchaser*], his bond or obligation, in the above-mentioned penalty, with such condition for making the same void, as hereinafter is contained.

FOR QUIET ENJOYMENT; WHERE TITLE WAS TOO RECENT.

NOW THE CONDITION of the above-written bond or obligation is such, that, if the said piece or parcel of land, hereditaments, and premises, comprised in and conveyed, or intended to be conveyed by, the hereinbefore recited indenture of release, of even date with these presents, with the appurtenances, shall, from time to time, and at all times hereafter, go, and remain, *To the uses*, in and by the same indenture of release limited, expressed, or declared, of and concerning the same; and be peaceably and quietly entered into and upon, and held, occupied, possessed, and enjoyed; and the rents, issues, and profits thereof, and of every part thereof, had, received, and taken accordingly; without the lawful let, suit, trouble, denial, eviction, interruption, claim, or demand whatsoever, of or by any person or persons whomsoever, (*other than, and except* any person or persons claiming, or to claim, by, from, or under the said [T. B.]) (*a*); *Then*, the above-written bond or obligation to be void, and of no effect; otherwise to be and remain in full force and virtue.

Condition, if premises conveyed should hereafter remain to the uses declared in the release;

and be peaceably enjoyed;

and the rents received;

without interruption by any person whomsoever;

(except, &c.);

then the bond to be void.

(*a*) This exception is made because the purchaser has the benefit of the covenants for title, in the purchase deeds subsequent to T. B.'s. Probably his purchase was from trustees, who were not obliged to enter into covenants for title.

FOR QUIET ENJOYMENT AGAINST ALL PERSONS, EXCEPT LESSEE FOR YEARS.

BOND *from a Vendor to a Purchaser, for peaceable Enjoyment of an Estate, against all Persons whomsoever;* EXCEPTING *Persons claiming under a Lease for Years.*

Obligation from one to one.

BOND from [*vendor*], of &c., to [*purchaser*], of &c., in the sum of [*double the purchase money*] pounds, *ut ante*, p. 179.

Recital of lease for years: lease and release to purchaser:

WHEREAS (*recite a lease for years by vendor, then,* that, by indentures of lease and release, the lease bearing date, &c., and made between, &c., in consideration of —— pounds, paid by purchaser to vendor, *All*, &c. were conveyed and assured unto and to the use of the said [*purchaser*], his heirs and assigns, for ever). AND WHEREAS, at the time of executing the said in part recited indentures of lease and release, it was agreed between the said [*vendor*] and [*purchaser*], that he the said [*vendor*] should enter into such an obligation as is above written, with such a condition as is hereinafter contained.

agreement for bond.

Condition, if purchaser, his heirs, &c. should peaceably enjoy premises;

NOW THEREFORE THE CONDITION of the above-written obligation is such, that, if the said [*vendor*], his heirs or assigns, shall and do, from time to time, and at all times hereafter, peaceably and quietly have, hold, occupy, possess, and enjoy the said messuages and hereditaments, comprised in, and granted and released, by the said indenture of release, and every of them, and every part thereof, with their appurtenances; *And* have, receive, and take the rents, issues, and profits thereof, and of every part thereof, to and for his and their own use and benefit; without the lawful let, suit, trouble, denial, eviction, interruption, claim, or demand whatsoever, of or by him the said [*vendor*], or his heirs, or any other person or persons whom-

and receive the rents;

without interruption by any person whomsoever;

soever, any estate, charge, right, title, or interest, legal or equitable, having or claiming, or at any time or times hereafter, to have or claim, in, to, from, out of, or upon the said hereditaments, or any of them, or any part thereof; (*Save and except* the person or persons claiming, or to claim, on account or in respect of the said recited lease); *Then*, and in that case, the said obligation to be void; otherwise to be and remain in full force and virtue.

FOR QUIET ENJOYMENT AGAINST ALL PERSONS, EXCEPT LESSEE FOR YEARS.

(except persons claiming under lease for years); then bond to be void.

BOND *from a Vendor to a Purchaser, for quiet Enjoyment against all Mankind; free from all Incumbrances; and for further Assurance generally.*

FOR QUIET ENJOYMENT GENERALLY, FURTHER ASSURANCE, &c.

BOND from [*vendor*], of &c., to [*purchaser*], of &c., in the sum of [*double the purchase money*] pounds, *ut ante*, p. 179.

Obligation from one to one.

WHEREAS [*testator*], late of &c., who was the only brother and heir-at-law of [——], late of &c., who died intestate, as to his real estate, and without issue, duly made and published his last will and testament in writing, bearing date on or about the —— day of ——, 18—, and thereby devised all his real estates to his wife [*wife*]; and appointed her sole executrix of his will. AND WHEREAS the said testator died on or about the —— day of ——, 18—, without having altered or revoked his said will; *And* shortly after his decease, his said widow and executrix duly proved the said will in the prerogative court of Canterbury. AND WHEREAS the said [*widow*] afterwards intermarried with and is now the wife of the said [*obligor*]. AND WHEREAS the said [*obligor*] and [——] his wife have lately sold unto the said [*purchaser*], *All that*, &c., and the inheritance thereof in fee simple, being part of the hereditaments and real estate by the said will of the said

Recital of will whereby testator devised all his real estates to his wife:

death of testator, and proof of his will:

marriage of widow with obligor:

sale to purchaser of part of the estate devised:

FOR QUIET ENJOYMENT GENERALLY, FURTHER ASSURANCE, &c.

[*testator*], deceased, devised to the said [*wife*], as aforesaid, at or for the price or sum of —— pounds: AND, in consideration thereof, by indentures of lease and release, the lease bearing date the day before, and the release bearing even date with the above-written bond or obligation, and made between the said [*obligor*], and [——] his wife, of the one part; and the said [*purchaser*], of the other part; *and* by virtue of a fine, duly levied, or intended to be levied, in pursuance of a covenant for that purpose contained in the said indenture of release, the lands, &c. hereinbefore described, and the inheritance thereof in fee-simple, are conveyed and assured, or are intended to be conveyed and assured (*a*), unto and to the use of the said [*purchaser*], his heirs and assigns for ever. AND WHEREAS, upon the treaty for the purchase of the said hereditaments hereinbefore mentioned, it was agreed, that the said [*obligor*] should enter into a bond in the penalty of [*double the purchase money*], with a condition thereunder written, for securing unto the said [*purchaser*], his heirs and assigns, the quiet enjoyment of the same hereditaments; free from incumbrances; and for the further assurance thereof, in manner hereinafter mentioned.

lease and release, and fine to purchaser:

agreement for bond for quiet enjoyment, free from incumbrances, and for further assurance.

NOW THE CONDITION of the above bond or obligation is such, that, in case the said [*purchaser*], his heirs and assigns, shall and do, from time to time, and at all times hereafter, peaceably and quietly have, hold, occupy, possess, and enjoy, the said lands and hereditaments hereinbefore mentioned, and comprised in the said indenture of release bearing even date with the above-written bond or obligation; *and* receive and take the rents, issues, and profits thereof, and of every part thereof, to and for his and their use and benefit; without any let, suit, trouble, denial, eviction, ejection, interruption, or disturbance whatsoever, of, from, or by the said [*obligor*], and [——] his wife, or either of them, or of, from, or by any person *or persons whomsoever: AND that (*b*) if the said lands and hereditaments now are, and henceforth for ever hereafter

Condition, if purchaser should quietly enjoy premises;

and receive the rents;

free from all incumbrances;

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(*a*) If to uses to prevent dower, *vide ante*, p. 329.

(*b*) *Vide ante*, Vol. 2, p. 21.

shall remain, continue, and be unto the said [*purchaser*], his heirs and assigns, free and clear, and freely, clearly, and absolutely acquitted, exonerated, and discharged, or otherwise by the said [*obligor*], his heirs, executors, or administrators, or some or one of them, well and sufficiently saved, defended, kept harmless, and indemnified of, from, and against all, and all manner of former and other gifts, grants, bargains, sales, leases, mortgages, jointures, dowers, right and title of dower, uses, trusts, wills, intails, statutes, recognizances, judgments, extents, executions, debts, legacies, annuities, sum and sums of money, rent and arrears of rent; and of, from, and against all and singular other estates, titles, troubles, charges, and incumbrances made, done, committed, or suffered by the said [*obligor*], and [——] his wife, or any other person or persons whomsoever; AND MOREOVER, that, if the said [*obligor*], and [——] his wife respectively, and all and every other person or persons having, or lawfully or equitably claiming, or who shall or may have, or lawfully or equitably claim, any estate, right, title, trust, or interest in, to, or out of the said lands and hereditaments hereinbefore mentioned, and comprised in the said indenture of release, bearing even date with the above-written bond, or any part thereof, shall and do, from time to time, and at all times hereafter, upon every reasonable request in writing, and at the costs and charges of the said [*purchaser*], his heirs or assigns, make, do, acknowledge, levy, suffer, execute, and perfect, or cause or procure to be made, done, acknowledged, levied, suffered, executed, and perfected, all and every such further and other lawful and reasonable acts, deeds, and things, devices, conveyances, and assurances in the law whatsoever, for the further, better, more perfectly, lawfully, and absolutely, or satisfactorily granting, releasing, confirming, or otherwise assuring the said lands and hereditaments, with their appurtenances, unto and to the use of the said [*purchaser*], his heirs and assigns, or otherwise, as he or they shall direct or appoint; *As* by * the said [*purchaser*], his heirs or assigns, or his or their counsel in the law, shall be reasonably devised, or advised, and required; *Then* the above-written bond or obligation shall be void; but otherwise shall be and remain in full force.

FOR QUIET ENJOYMENT GENERALLY, FURTHER ASSURANCE, &c.

if further assurances should be made on purchaser's request;

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bond to be void.

TO REPAIR A ROAD.

BOND *from a Purchaser under the Commercial Road-Act, to the Trustees, to keep in Repair a Road from the Land purchased to communicate with the new Road.*

Obligation from one to seven.

BOND from [*purchaser*], of &c., to [*seven trustees*], of &c., being trustees appointed to carry into execution an act of Parliament made and passed in the —— year of the reign of his present Majesty King George the Fourth, intituled "*An act,*" &c. in the sum of —— pounds, *ut ante,* p. 179.

Recital, that trustees are seised of a piece of ground:

WHEREAS the above-named [*trustees*], as trustees as aforesaid, are seised of or entitled to a piece or plot of ground, lying and being between the old road, in the said act of Parliament called ——, and the road made, or intended to be made, under the said act of Parliament.

which not being wanted for purposes of act, trustees are authorized to sell same:

AND WHEREAS the same piece or parcel of ground, together with so much of the old road as adjoins thereon, not being wanted for the purposes of the said act, the said trustees are authorized by the said act to make sale thereof to any person who shall be an occupier or occupiers of any buildings fronting such ground, and who shall hold the same buildings for any term longer than seven years.

that act required purchaser to keep a private road in repair:

AND WHEREAS (*recite that it is required by the act, that, in case of such sale, the purchaser should be bound to keep in repair a good road from such old road to the new one.*)

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contract for sale and conveyance to purchaser: sale made, on condition that purchaser should repair road.

AND * WHEREAS (*recite contract for sale to* [*purchaser*]; *and lease and release* (*a*) *to him.*) AND WHEREAS the said sale was made on condition that the said [*purchaser*], his heirs, executors, administrators, or assigns, should make and keep in repair, during the said term of —— years,

(*a*) See the release, with the above recitals at length, *post,* title PURCHASE, *Release by Trustees.*

such road, of twenty feet wide, as aforesaid, and at the end of the said term deliver up the same, or cause or procure the same to be delivered up, to the owner or owners of the premises now in the occupation of the said [*purchaser*], to be holden by such owner or owners, jointly with the said [*purchaser*] and [A. B.], and the heirs and assigns of the said [A. B.].

TO REPAIR A ROAD.

NOW THE CONDITION of the above-written bond is such, that, in case the said [*purchaser*], his heirs, executors, administrators, or assigns, shall and do, as soon as the same can be done, make and set out, and from time to time, during the said term of —— years, keep in repair a good and sufficient carriage road, of the width of twenty feet at least, from the front of the same premises now in the possession of the said [*purchaser*], to the road made by the said trustees under or by virtue of the said act. AND ALSO, in case the said [*purchaser*], his heirs, executors, administrators, or assigns, shall and do, at the expiration of the said term of —— years, deliver up the said carriage road, or cause and procure the same to be delivered to the owner or owners of the said premises so occupied by him the said [*purchaser*] as aforesaid, to be holden and enjoyed by the said owner and owners jointly with the said [*purchaser*] and [A. B.], and the heirs and assigns of the said [A. B.], for the purpose of communication with the road made, or intended to be made, under or by virtue of the said act; *Then*, and in such case, the above-written bond or obligation shall be void, and of no effect; but otherwise shall be and remain in full force and virtue.

Condition if purchaser should, during his term, repair road;

and at the end of term deliver up same to be enjoyed by owner of land, jointly with purchaser and another;

bond to be void.

TO RESIGN RECTORY IN FAVOR OF ONE OF PATRONESS'S TWO SONS, WHEN HE IS COMPETENT.

BOND *to resign a Rectory* (*a*) *upon Request, after either of the Patroness's two Sons is competent to take it* (*b*), *and in the mean time to reside.*

Obligation from one to one.

BOND from [*parson*], of &c., clerk, to [*patroness*], of &c., widow, in [*double the value of the living for the parson's life*] pounds, *ut ante*, p. 179.

Recital that rectory was vacant by death of last

WHEREAS the rectory of the church of [B.], within the county of [*Norfolk*] and diocese of [*Norwich*], is now va-

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On bonds of resignation.

(*a*) ON BONDS OF RESIGNATION.—Simony was not an offence punishable in a criminal way at the common law. Moore, 564; Cro. Car. 361. The ecclesiastical law deprived the incumbent of the living; but it could not affect the temporal rights of any person for making a simoniacal contract, or subject him to any forfeiture or penalty. However, it was at length prohibited under very severe penalties, by the following act: 31 Eliz. cap. 6, intituled, "*An act against abuses in election of scholars, and presentation to benefices.*" The three first sections of this act, and the greater part of the fourth, relate to the election of fellows, scholars, &c., into colleges, &c. But at the end of the fourth section, are the following words: "And for the avoiding of simony, and corruption in presentations, collations, and donations of and to benefices, dignities, prebends, and other livings and promotions ecclesiastical, and in admissions, institutions, and inductions to the same."

A. D. 1589.

The penalty for simoniacally presenting to a benefice, or for being presented for reward.

Sect. 5. "Be it further enacted by the authority aforesaid, that, if any person or persons, bodies politic and corporate, shall or do at any time after the end of forty days next after the end of this session of Parliament, for any sum of money, reward, gift, profit or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurance, of or for any sum of money, re-

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[(*b*) This precedent has been altered from that of a bond in favour of *any* of the patroness's sons, as it was in the former edition, to that of a bond in favour of one of *two* sons of the patroness, in order to make it conformable to the provisions of the late act. *Vide post*, p. 367.]

cant by the death of [*last rector*], clerk, the last incumbent there; and the above-named [*patroness*] being the un- TO RESIGN RECTORY. incumbent;

ward, gift, profit, or benefit whatsoever, directly, or indirectly, present, or collate any person to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, or give or bestow the same for or in respect of any such *corrupt* cause or consideration, that then every such presentation, collation, gift, and bestowing, and every admission, institution, investiture, and induction thereupon, shall be utterly void, frustrate, and of none effect in law: And that it shall and may be lawful to and for the queen's majesty, her heirs and successors, to present, collate unto, or give or bestow every such benefice, dignity, prebend, and living ecclesiastical, for that one time or turn only, and that all and every person or persons, bodies politic and corporate, that from thenceforth shall give or take any such sum of money, reward, gift, or benefit, directly or indirectly, or that shall take or make any such promise, grant, bond, covenant, or other assurance, shall forfeit and lose the double value of one year's profit of every such benefice, dignity, prebend, and living ecclesiastical; and the person so corruptly taking, procuring, seeking, or accepting any such benefice, dignity, prebend, or living, shall thereupon and from thenceforth be adjudged a disabled person in law, to have or enjoy the same benefice, dignity, prebend, or living ecclesiastical."

Anciently it was held, that the statute did not make the bond void, but only the presentment. *Differentiam inter malum in se, et malum prohibitum.*

Lord Coke says, "*Nota*, the statute doth not make the bond, promise, covenant, or other assurance void, but the presentment, &c., and so it was adjudged, Pasch. 40 Eliz. Rot. 1745, *in communi banco*, between *Gregory*, plaintiff, and *Oldbury*, defendant. *Nota differentiam inter malum in se* against the common law, *et malum prohibitum*, by statute law; *et malum in se* against the common law, and *malum prohibitum* by the civil or canon law; whereof the judges of the common law, in these cases, take no notice." 3 Inst. 153; *post*, p. 387, 403, 404. Therefore, if the incumbent did not resign on request, he was subject to the whole penalty of the bond. Degge's Parson's Counsellor, 55, 6th ed. *Sed vide post*, pp. 368-9, 382-3, 397.

What is simony now, depends on 31 Eliz. c. 6.

What is or is not simony *now*, depends on the statute 31 Eliz. c. 6, which did not adopt all the wild notions of the canon law; but has *defined* it to be a corrupt agreement to present. *Per* Chief Justice De Grey, *Barrett* v. *Glubb*, 2 Wm. Bla. 1052; Cunningham's Law of Simony, 2, 97; 3 Inst. 153.

Definition of bonds of resignation, as being either special or general.

A BOND OF RESIGNATION is a bond given by the person presented, or intended to be presented to a benefice, with a condition to resign the same: and is *special* or *general*. The condition of a special one is, to resign the benefice in favour of some certain person, as a son, kinsman, or friend of

and that patroness had presented obligee to the bishop:

doubted patroness of the said rectory and church is about, by writing under her hand and seal, to present the above-bound

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the patron, when he shall be capable of taking the same. By a general bond, the incumbent is bound to resign on request.

Invalidity of general bonds of resignation, considered as settled, since *Bishop of London* v. *Ffytche.*

Formerly, general as well as special bonds of resignation, whether given before or after the presentation, were held good at law, and Chancery only interfered when an improper use was attempted to be made of them. But in the case of the *Bishop of London* v. *Ffytche*, [3 Burn's Eccl. Law, 356; 1 East, 487; Cunningham's Law of Simony], the House of Lords held, that a PRESENTATION *after* a general *bond of resignation*, is illegal: the bond being a *benefit* to the patron, within the 31 Eliz. c. 6; and the giving it being the *price* of his presentation; and it being given for the *purpose* of obtaining the presentation. And, therefore, the House held, that the bishop could not be compelled to induct the parson presented. The validity of the bond was not in issue: indeed it could not be in a *quare impedit*, although those who supported the determination maintained that the bond was good. However, subsequently to that case, the prevailing opinion of the profession has been, that no *general* bond of resignation could be supported; and writers have even gone so far as to say, that the House adjudged that a general bond of resignation was void. See Leach's note, 12 Mod. 505, (*b*); 6 Bac. Abr. Gwill. ed. 192; 1 *Ibid.* 644, (K); 1 Fonbl. Trea. Equity, 232, (*b*); Christian's note, 2 Bl. Com. 280, (8); 6 Supp. Vin. Abr. 173, pl. 2; Ellis on Debtor and Creditor, 119; and the subsequent cases concerning bonds of resignation. Dr. Wooddeson, with his usual discrimination, classes it with the causes for which a bishop may legally reject a clergyman presented to him for institution. 1 Wooddes. Vin. Lect. 323.

Alteration in the present edition by omitting the discussion respecting resignation bonds.

[In the former edition, Mr. Bythewood had devoted more than fifty pages to a statement of the facts and arguments in the case of The *Bishop of London* v. *Ffytche*, and the other adjudications on the much litigated question respecting the validity of bonds, conditioned for the resignation of ecclesiastical benefices. As that question was then depending before the highest judicial tribunal, and involved principles of the greatest public interest, the application of which had been the subject of much contrariety of opinion, and many conflicting determinations, perhaps the appropriation of even so large a space to its discussion might have been warranted: but since the law upon the subject now presents itself under quite a different aspect, depending not upon the result of the cases embraced in this discussion, but upon positive legislative enactment; the present editor has felt that, though his own labour might have been much abridged by retaining these

[*parson*] to the bishop of the said diocese, to the end that he, the said [*parson*], may be admitted, instituted, and in- TO RESIGN RECTORY.

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cases, merely adding the recent decisions and acts of Parliament, yet, that it was scarcely proper to allow the pages of a work so extended in its nature as the present, to be loaded with the elaborate consideration of a point which has entirely lost its practical utility. He has, therefore, omitted the whole of the note, extending from p. 362 to p. 414 in the former edition, by which he has been enabled to enter more fully into some points of great practical importance, connected with the subjects treated of in the present volume, and also to give some information respecting the land tax and the statutory provisions for its redemption, (*vide post*).

It will be sufficient to observe, that the invalidity of bonds of resignation in favour of a designated individual, (with respect to which alone any doubt has been entertained in modern times,) was finally established by the House of Lords, in the case of *Fletcher* v. Lord *Sondes*, 5 Barn. & Ald. 835; 3 Bing. 501, and 1 Bligh, New Ser. 144, and noticed *post*, Vol. 4, p. 238. As the effect of this decision would have been to expose to penalties numerous persons who had been parties to such transactions, in ignorance of the existing law, as well as to invalidate all antecedent engagements of this nature, the interposition of the legislature became necessary, and accordingly the following statute was passed.

An Act for the relief of certain spiritual persons and patrons of ecclesiastical preferments, from certain penalties; and rendering valid certain bonds, covenants, or other assurances, for the resignation of ecclesiastical preferments. [14 June, 1827]. Stat. 7 & 8 Geo. 4, c. 25.

"WHEREAS by an act made and passed in the 31st year of the reign of her late majesty queen Elizabeth, intituled 'An act against Abuses in Elections of Scholars and Presentations to Benefices,' it is enacted in the words or to the effect following: to wit, 'For the avoiding of simony and corruption in presentations, collations, and donations of and to benefices, dignities, prebends, and other livings and promotions ecclesiastical; and in admissions, institutions, and inductions to the same; be it further enacted, by the authority aforesaid, that if any person or persons, bodies politic and corporate, shall or do at any time after the end of forty days next after the end of this session of Parliament, for any sum of money, reward, gift, profit, or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurance, of or for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly, present or collate any person to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, or give or bestow the same for or in respect of any such corrupt cause or consideration; that then every such presentation, collation, gift, and bestowing, and every admis- 31 Eliz. c. 6.

that obligee hath agreed to be personally resident

ducted into the said rectory and church of [B.]. And WHEREAS the said [*parson*] hath agreed to be personally

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sion, institution, investiture, and induction thereupon, shall be utterly void, frustrate, and of none effect in law. And that it shall and may be lawful to and for the Queen's Majesty, her heirs and successors, to present, collate unto, or give or bestow every such benefice, dignity, prebend, and living ecclesiastical, for that one time or turn only. And that all and every person or persons, bodies politic and corporate, that from thenceforth shall give or take any such sum of money, reward, gift, or benefit, directly or indirectly, or that shall take or make any such promise, grant, bond, covenant, or other assurance, shall forfeit and lose the double value of one year's profit of every such benefice, dignity, prebend, and living ecclesiastical; and the person so corruptly taking, procuring, seeking, or accepting any such benefice, dignity, prebend, or living, shall thereupon, and from thenceforth, be adjudged a disabled person, in law, to have or enjoy the same benefice, dignity, prebend, or living ecclesiastical. *And whereas* since the passing of the said act, many the spiritual persons, or others, before or after the presentation or collation, or appointment by donation of spiritual persons, to spiritual offices, being benefices with cure of souls, dignities, prebends, or livings ecclesiastical, have made, given, or entered into certain engagements by promise, agreement, grant, bond, covenant, or other assurance, to or with the patron or patrons of such spiritual offices, or to or with some other person or persons for the resignation of such spiritual offices, to the intent or purpose that some person specially named or described in such engagement, or one or two persons so specially named or described, should be presented, collated, or nominated to such spiritual offices respectively, or that the same should be given or bestowed to or upon him, or for the resignation thereof, upon notice, or request or otherwise, when a person, or one or two persons so specially named or described, should become qualified by age or otherwise to accept and take the same. *And whereas* it has lately been adjudged and determined at law, that such engagements as aforesaid come within the intent and meaning of the said recited act. *And whereas* the spiritual persons and patrons, and other persons who have been parties to such engagements, will suffer great hardship and detriment, unless they be relieved from the pains, penalties, forfeitures, loss, or disabilities to which they have erroneously, but without having wilfully acted in contravention of the said recited act, rendered themselves liable by reason of having given, or entered into, or accepted or taken such engagements.' For remedy thereof be it enacted, &c. 'That no presentation, collation, gift, or bestowing of any such spiritual office, to or upon any spiritual person, before the 9th day of April, in the present year of our Lord 1827; nor any admission, institution, investiture, or induction thereupon, shall be void, frustrate, or of no effect

No presentation to any spiritual office, made before 9th April, 1827, shall be

resident in the said parish of [B.] so long as he shall continue rector or incumbent there, without procuring or ac- in the parish during his incumbency.

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in law, for or by reason of any such engagement made, given, or entered into by such spiritual person, or any other person or persons to or with the patron or patrons of such spiritual office, or to or with any other person or persons for the resignation of the same, to the intent or purpose manifested by the terms of such engagement, that some person specially named or described therein, or one of two persons so specially named or described, should be presented, collated, or nominated to such spiritual office, or that the same should be given or bestowed to or upon him, or for the resignation thereof, upon notice or request, or otherwise, when a person, or one of two persons, so specially named or described, should become qualified by age or otherwise, to accept and take the same. And that it shall not be lawful for the King's most excellent majesty, his heirs, or successors, for, or by reason of, any such engagement as aforesaid, to present or collate unto, or give or bestow such spiritual office. *And that* such spiritual person and patron or patrons, or other person or persons respectively, shall not be liable to any pains, penalty, forfeiture, loss, or disability, nor to any prosecution or other proceeding, civil, criminal, or penal, in any Court, ecclesiastical or temporal, for or by reason of his, her, or their, having made, given, or entered into, or accepted or taken such engagement, as aforesaid. *And that* every such presentation, or collation, or gift, or bestowing, before the said 9th day of April, in the present year of our Lord 1827; and every admission, institution, investiture, and induction thereupon, shall be as valid and effectual in the law to all intents and purposes whatsoever, as if such engagement had not been made, given, or entered into, or accepted, or taken; any thing in the said recited act, or in any other act, statute, or canon, or any law, to the contrary in anywise notwithstanding.

void on account of any agreement to resign, when another person, specially named, shall become qualified to take the same.

Persons making any such agreement, not subject to any penalty on account thereof.

Sect. 2 enacts, "That every such engagement which hath been made, given, or entered into, at any time before the said 9th day of April, in the present year of our Lord, 1827, for the resignation of any benefice, with cure of souls, dignity, prebend, or living ecclesiastical, to the intent or purpose manifested by the terms of such engagement, that some person specially named or described therein, or one of two persons so specially named or described, should be presented, collated, or nominated to such spiritual office, or that the same should be given or bestowed to or upon him, or for the resignation thereof, upon notice or request, or otherwise, when a person, or one of two persons so specially named or described, should become qualified by age or otherwise, to accept and take the same, shall be good, valid, and effectual in the law to all intents and purposes whatsoever; any thing in the said recited act, or in any other act, statute, or canon, or any law, to the contrary in anywise notwithstanding.

All such engagements entered into before 9th April, 1827, valid and effectual in law.

TO RESIGN RECTORY.

cepting any qualification, license, or dispensation from any person or persons for dispensing with his the said [*par-*

Proviso as to engagements not *bonâ fide* made with such intent.

Sect. 3, provides, "That nothing in this act contained shall extend, or be construed to extend, to the case of any engagement which shall not have been made, given, or entered into, really and *bonâ fide*, to the intent or purpose aforesaid, and no other: Provided also, that nothing herein contained shall be deemed compulsory upon the ordinary to accept the resignation.

If the person so specially named be not presented to such spiritual office within six months the resignation to be void.

Sect. 4, provides, "That in every case where any such spiritual office shall, after the passing of this act, be resigned pursuant to any such engagement, and the person, or one of the two persons so specially named or described therein, shall not be presented, collated, nominated, or appointed by donation to such spiritual office within six calendar months next after such resignation, the resignation which shall so have been made pursuant to such engagement, shall, to all intents and purposes, be void and of no effect, and the spiritual person who shall so have resigned, shall, without any act or form, and as if such resignation had not been made, be deemed and taken, to all intents and purposes, to be and to have continued the incumbent actually in possession of such spiritual office, notwithstanding such resignation, and although within the said six months any other person may have been presented, collated, nominated, instituted, or inducted thereto, or received investiture thereof, provided such person so resigning shall not, by reason of any other act or thing, have become disqualified to hold the same.

Proviso as to proceedings already commenced.

Sect. 5, provides, "That nothing in this act contained, shall extend, or be construed to extend to the case of any such engagement, upon or with respect to which any action, suit, bill, plaint, or information, shall have been brought, sued out, or commenced and prosecuted before the 9th day of April, in this present year."

This statute, it will be observed, had an *ex post facto* operation only, and left the law respecting future bonds of resignation untouched; but an act has since been passed upon this subject also.

Stat. 9 Geo. 4, c. 94.]

An Act for rendering valid Bonds, Covenants, and other Assurances for the Resignation of Ecclesiastical Preferments, in certain specified Cases. [28 July, 1828].

"WHEREAS it is expedient that certain bonds, covenants, and other assurances for the resignation of ecclesiastical preferments should be valid in the cases, and subject to the limitations hereinafter specified; *Be it therefore enacted, &c.*, That every engagement by promise, grant, agreement, or covenant, which shall be really and *bonâ fide* made, given, or entered into, at any time after the passing of this act, for the resignation of any spiritual office, being a benefice with cure of souls, dignity,

Engagements entered into for the resignation of any benefice, to the intent that one person or

son]'s residence in or upon the said parish. AND WHEREAS the said [*patroness*] hath two sons, [A. B.] and [C. D.], that patroness hath two infant sons, and it

prebend, or living ecclesiastical, to the intent or purpose to be manifested by the terms of such engagement, that *any* ONE *person whosoever, to be specially named and described therein, or* ONE *or* TWO *persons to be specially named and described therein, being such persons as are hereinafter mentioned*, shall be presented, collated, nominated or appointed to such spiritual office, or that the same shall be given, or bestowed, to or upon him, shall be good, valid, and effectual in the law, to all intents and purposes whatsoever, and the performance of the same may also be enforced in equity†. PROVIDED ALWAYS, that such engagement shall be so entered into before the presentation, nomination, collation, or appointment of the party so entering into the same as aforesaid.

two persons (as after mentioned) shall be presented, to be good,

and may be enforced in equity.

Sect. 2, provides, "That where TWO persons shall be so specially named and described in such engagement, each of them shall be, either by blood or marriage, an *uncle, son, grandson, brother, nephew*, or *grandnephew*, of the patron, or of one of the patrons of such spiritual office, not being merely a trustee or trustees of the patronage of the same, or of the person or one of the persons for whom the patron or patrons shall be a trustee or trustees, or of the person or of one of the persons, by whose direction such presentation, collation, gift, or bestowing, shall be intended to be made, or of any married woman whose husband in her right shall be the patron or one of the patrons of such spiritual office, or of any other person in whose right such presentation, collation, gift, or bestowing, shall be intended to be made.

Where two persons named each to be uncle, son, grandson, brother, nephew, or grandnephew of the patron.

Sect. 3, provides, "That no presentation, collation, gift, or bestowing, to or of any such spiritual office of or upon any spiritual person, to be made after the passing of this act, nor any admission, institution, investiture, or induction thereupon, shall be void, frustrate, or of no effect in law, for or by reason of any such engagement so to be made, given, or entered into, by such spiritual person, or any other person or persons, to or with the patron or patrons of such spiritual office, or to or with any other person or persons for the resignation of the same, as aforesaid; and that it shall not be lawful for the king's most excellent majesty, his heirs or successors, for, or by reason of, any such engagements as aforesaid, to present, or collate unto, or give, or bestow, such spiritual office; and that such spiritual person and patron or patrons, or other person or persons respectively, shall not be liable to any pains, penalty, forfeitures, loss, or disability, nor to any prosecution or other proceeding, civil, criminal, or penal, in any court, ecclesiastical or temporal,

No presentation to any spiritual office shall be void by reason of such agreement to resign.

Persons making such agreement, not to be liable to penalty.

† The contrary had been decided, see 6 Mad. 133.

being probable one of them may be desirous

who are infants; but it being probable that one of the said sons, having first taken holy orders, may be desirous

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for or by reason of his, her, or their having made, given, or entered into, or accepted, or taken such engagement as aforesaid: *And that* every such presentation, or collation, or gift, or bestowing, to be made after the passing of this act, and every admission, institution, investiture, and induction thereupon, shall be as valid and effectual in the law, to all intents and purposes whatsoever, as if such engagement had not been made, given, or entered into, or accepted, or taken: any thing in an act passed in the 31st year of the reign of her late majesty, Queen Elizabeth, intituled, 'An Act against Abuses in Elections of Scholars and Presentations to Benefices,' or in any other act, statute, or canon, or any law, to the contrary in anywise notwithstanding.

Such presentations to be valid.

31 Eliz. c. 6 (*a*).

Not to extend to any engagements unless the deed be deposited, within two months, with the registrar of the diocese or peculiar jurisdiction wherein the benefice is situated.

Sect. 4, provides "That nothing in this act shall extend to the case of any such engagement as aforesaid, unless one part of the deed, instrument, or writing, by which such engagement shall be made, given, or entered into, shall, within the space of two calendar months next after the date thereof, be deposited in the office of the registrar of the diocese, wherein the benefice, with cure of souls, dignity, prebend, or living ecclesiastical, for the resignation whereof such engagement shall be made, given, or entered into, as aforesaid, shall be locally situate, except as to such benefices, with cure of souls, dignities, prebends, or livings ecclesiastical, as are under the peculiar jurisdiction of any archbishop or bishop; in which case such document as aforesaid shall be deposited in the office of the registrar of that peculiar jurisdiction to which any such benefice, with cure of souls, dignity, prebend, or living ecclesiastical shall be subject; and such registrars shall respectively deposit and preserve the same, and shall give and sign a certificate of such deposit thereof. And every such deed, instrument, or writing, shall be produced at all proper and usual hours, at such registry, to every person applying to inspect the same. And an office copy of each such deed, instrument, or writing, certified under the hand of the registrar (and which office copy so certified, the registrar shall, in all cases, grant to every person who shall apply for the same) shall, in all cases, be admitted and allowed as legal evidence thereof in all courts whatsoever: And every such registrar shall be entitled to the sum of two shillings, and no more, for so depositing, as aforesaid, such deed, instrument, or writing, and so, as aforesaid, certifying such deposit thereof, and the sum of one shilling, and no more, for each search to be made for the same, and the sum of sixpence, and no more, over and besides the stamp duty, if any, for each folio of seventy-two words of each such office copy so certified as aforesaid.

Deed to be open to inspection and a certified copy to be admitted as evidence.

Fees to registrar.

(*a*) Stated *ante*, p. 360.

presented to the said rectory and church of [B.] the said [*parson*] hath agreed in that event to resign the said living

to be presented to the living, parson hath

Sect. 5, enacts, "That every resignation to be made in pursuance of any such engagement as aforesaid, shall refer to the engagement in pursuance of which it is made, and state the name of the person for whose benefit it is made; *And that* it shall not be lawful for the ordinary to refuse such resignation unless upon good and sufficient cause to be shewn for that purpose, and that such resignation shall not be valid or effectual, except for the purpose of allowing the person for whose benefit it shall be so made, to be presented, collated, nominated, or appointed to the spiritual office thereby resigned, and shall be absolutely null and void unless such person shall be presented, collated, nominated, or appointed as aforesaid, within six calendar months next after notice of such resignation shall have been given to the patron or patrons of such spiritual office.

Resignation to state the engagement and name of person for whom made. Ordinary not to refuse resignation without sufficient cause.

Resignation to be void unless the person be presented within six months.

Sect. 6, provides, "That nothing in this act shall extend to any case where the presentation, collation, gift, or bestowing, to or of any such spiritual office as aforesaid, shall be made by the king's most excellent majesty, his heirs, or successors, in right of his crown, or of his duchy of Lancaster, or by any archbishop, bishop, or other ecclesiastical person, in right of his archbishoprick, bishoprick, or other ecclesiastical living, office, or dignity, or by any other body politic or corporate, whether aggregate or sole, or by any other person or persons in right of any office or dignity, or by any company, or any feoffees, or trustees for charitable or other public purposes, or by any other person or persons not entitled to the patronage of such spiritual office as private property."]

Nothing herein to extend to presentations made by the king, corporations, trustees, &c.

In *Legh* v. *Lewis*, 1 East, 391, it was held, that a bond given by a schoolmaster of an ancient public school, who had a freehold in his office, to resign at the request of his patron, is good at law; but equity will restrain any improper use of it by the patron. Lord *Kenyon* said, "I cannot see any thing illegal or wrong in the patron of this school taking a general bond of resignation from the schoolmaster whom he appoints. Many good reasons may occur for taking such a security; it enforces his good behaviour, and may tend to prevent those ill consequences which too frequently happen from the neglect of those whose duty it is to superintend such institutions. What is this but a more easy method of exercising a visitatorial authority? Such an authority must exist somewhere. If the plaintiff's ancestor founded the school, and no particular visitor were appointed, the authority descends to him as heir†. Suppose the plaintiff himself had been the founder, what could have prevented him from taking such a

A. D. 1801. A general bond of resignation by the master of an ancient public school, is good.

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† As to the power of a visitor of an eleemosynary foundation, *vide* INDEX TO THE NOTES, tit. VISITOR.

Visitor's power.

agreed in that event to resign upon request.

or rectory, upon the request of the said [*patroness*], or the patron of the said rectory for the time being, in order that

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bond? If indeed the defendant could have shewn that any corrupt use were intended to be made of such a bond, he would lay the axe to the root: the Attorney-General would *ex officio* interfere, and upon application to the Court of Chancery the appointment would be taken out of the hands of him who so exercised it corruptly. The case of *Laying* v. *Payne*, [Willes, 571, 4,] turned out altogether upon the statute of Edw. 6, which applies only to the sale of offices of a public nature under the crown, and certainly not to an office of this description. But I never can admit that at common law a general resignation bond of an office is illegal, although the party may have a freehold in the office. In the instance of ecclesiastical livings, that is universally the case: every rector has a freehold in his rectory; yet it was never doubted but that resignation bonds for certain purposes, and up to a certain extent at least, were binding, though they put an end to the freehold. This was fully decided in *Grey* v. *Hesketh*, Ambl. 268; 3 Burn's Ecc. Law, 332, 354, 6th ed. *S. C.* in B. R. by Lord *Hardwicke;* saying at the same time, that if an ill use were attempted to be made of them, the Court of Chancery would interfere, as in *Durston* v. *Sandys*, 1 Vern. 411. Here nothing of that sort is attempted to be shewn. Nor indeed does it distinctly appear upon the plea what the nature of this office is, how constituted, or whether the appointment must necessarily be for life, without any condition annexed. At present I see no grounds for deciding that the condition of the bond is necessarily illegal." Mr. Justice *Grose* was of the same opinion. Mr. Justice *Lawrence* said, "I own I have considerable doubts upon the question. The plea is rather loosely drawn, and it might have stated with more precision the nature and extent of the foundation and power of appointment; it does however state that the office of schoolmaster is an office of trust and profit, and a freehold; that every person appointed thereto has always continued for life, without any condition to resign: and that it was the duty of the plaintiff to have appointed to the office without any such stipulation. If then we are to collect from thence that the founder intended that the appointment should be no otherwise than for life, it seems to me very doubtful how far the person who has the power of such appointment can exercise it in a different manner from what the founder intended. It is true that a bond may be taken to enforce the observance of those duties which by law are required to be performed by the appointee of an office; but then it should be so expressed in the condition. But a general bond like the present, though it may be made use of for good, may also be made use of for bad purposes; at least there is nothing on the face of the instrument to restrain the improper use of it, as there is where it is conditioned for the due performance and exe-

Lord *Kenyon* said it was never doubted but that special resignation bonds were binding.

such one of the said sons of the said [*patroness*] so taking orders may be presented thereto. TO RESIGN RECTORY.

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cution of the office. And as Lord Chief Justice *Willes* observed in the case referred to, such a general bond of resignation may be used as a mean of selling the office, or to favour the partial views of the patron by compelling the appointee to regulate his conduct, not by the duties of his office, but in subservience to the pleasure of his patron. The same argument was urged in favour of general resignation bonds in the case of livings, namely, that they were the means of enforcing good behaviour: but in the case of *The Bishop of London* v. *Ffytche*, Mr. Justice *Buller* observed on the inconclusiveness of that argument, by saying, that it might with equal force be argued, that it might be made use of for bad purposes†: it is true, that a great majority of the judges [all except one] were of opinion that such general resignation bonds were valid; but they grounded themselves upon a train of positive authorities in support of them, and not upon the reason of the thing: and it must be admitted, that if it were a new question at this day, it would be very difficult to say upon principle, that such bonds could be legal." Mr. Justice *Le Blanc* said, "After the determinations which have taken place with respect to general resignation bonds of livings, I cannot say that this bond is not good in point of law. It is true those determinations were impeached in the case of *The Bishop of London* v. *Ffytche*, in the House of Lords; but the decision in that case against the validity of such bonds turned ultimately upon the ground of their being simoniacal and against the statute, and not as being contrary to the general principles of the common law. That does not affect the present action upon such a bond relating to the office of a schoolmaster; and therefore it falls within the principle of the former determinations, that such general resignation bonds are good at law. And after such a current of authorities, I do not feel myself at liberty to canvass the grounds of that opinion."

In *The Bishop of London* v. *Ffytche*, the great majority of the judges founded their opinion on a train of positive authorities:

and the decision was on the ground of the bond being simoniacal and against the statute, and not as being contrary to the common law.

In Lord *Kircudbright* v. Lady *Kircudbright*, 8 Ves. 51, a father gave a bond to his son to secure him an annuity, until he should be in possession of a living of a certain value; and there was an agreement of the same date, reciting the bond, and declaring that the son would forthwith enter into holy orders, and accept such living. Lord Chancellor *Eldon* expressed a strong opinion, that, upon grounds of public policy, by the effect of the agreement, the transaction was illegal: but the decision was upon the ground that the son had not complied with the condition; having received the annuity nine years, and being still only in deacon's orders,

A. D. 1802. Bond by a father to secure an annuity to his son, until he should be in possession of a living of a certain value; and an agreement of the same date, reciting the bond, and declaring

† 1 East, 495.

Condition, if obligor should procure himself to

NOW THE CONDITION of the above-written obligation is such, *That*, if the said [*parson*] shall procure

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that the son would forthwith enter into holy orders, and accept such living: Lord Eldon expressed a strong opinion, that, upon grounds of public policy, by the effect of the agreement, the transaction was illegal.

that the annuity was determinable by the father or his representatives. The reporter says, "the Lord Chancellor expressed great doubt as to the validity of the bond of the late Lord Kircudbright; observing, that it was void on a great many accounts. It is a corrupt agreement for taking holy orders, such as the Court ought to decree to be delivered up. The *policy of the ecclesiastical constitution* of this country requires, that a man should take orders without any reference whatsoever to considerations of this nature. There is no objection to the bond itself, except as connected with this agreement, at the same time, for a pecuniary consideration to take holy orders. Another objection to this bond is, that the father is put under these circumstances, that he is to solicit the benefit of patronage for this pecuniary consideration moving from himself: the *policy of the law* supposing the patron to look out for persons the best that can be recommended to him; which excludes pecuniary consideration."

On a subsequent day his Lordship said, "the Court is called upon for a distribution of the assets of the late Lord Kircudbright, and all the facts are stated. Whatever course this might have taken, whether as a claim before the master, or by a bill as a creditor by annuity under this bond, Lord Kircudbright might have established himself as a creditor. If he could have said, the Court could not look at the other instrument, upon the bond itself I see no objection to the demand; for there is no reason against such a bond by a father to pay an annuity to his son, till he is in a situation prescribed in the bond. It puts no party under any contract to do any act, either to produce the situation as clerk, or those emoluments to which a clerk only can be inducted. All beyond the bond are the spontaneous acts of the parties. But if the other instrument is to be considered with the bond, the first observation upon the instrument is, that the parties did not think this transaction ought to appear upon one instrument. They make it therefore false as to the consideration professed, *viz.* purely love and affection. The fact is not so. The agreement reciting the bond does not import that it is to have no effect upon the bond; that it has a purer nature than that of the transactions between father and son, alluded to by the Solicitor-General; and not amounting to or affecting the legal contract: but it is an express instrument to affect that contract, as contract; and an express declaration by the son, that, unless he should enter into that, which he was to understand to be binding as a legal contract, there was no contract whatsoever by his father."

Bond by a father to secure an annuity to his son, until he shall be in possession of a living of a certain value, is legal: but, it seems, a superadded contract will make it illegal.

"This case raised a very considerable and important question to the purity of the church establishment; whether the principles of it, requiring from the candidates for holy orders, that they should pledge themselves

himself to be legally and canonically admitted, instituted, and inducted into the said rectory and church of [B.], by

be induced under the presentation;

solemnly as to the motives inducing them to enter into that profession, and considering the purity of their motives as one principal test of their sufficiency, if the bond were an instrument between strangers, the Court would support it; involving this question, whether one party might not have come here, stating, that he was willing to take orders, provided this fund was set apart; and whether he could call upon the Court to set apart a portion of the assets, and decree him to take orders. The next consideration is, whether, if there would be any objection to this transaction in the case of strangers, it may not prevail between father and son. It is not necessary in this case to decide either of those questions; but I should be very unwilling to part with this subject, without saying, that, however familiar it may be, that this transaction is right, I desire it not to be understood, that any Court of justice has acceded to that opinion. I should have been very unwilling to put these parties to the expense of arguing the point in a Court of law; and would rather have taken the short mode of speaking to some of the judges upon it. Last night I mentioned it to one of the Chief Justices; who told me, his mind was impressed with the same doubt upon this subject as mine. If the attention of people was called to this, the difficulty would not be felt. But circumstances that are very ill reconciled to what is required upon the resignation and acceptance of livings, and the absence of all contract by ecclesiastical men upon these subjects, happen with a frequency making them so familiar, that men who, if well informed, would be the last to act incorrectly, will do so, unless they take the trouble to inquire whether such practices are reconcileable either to law, or to our ecclesiastical constitution."

A. D. 1815. Condition bad in part may be good as to the other parts; for, at common law, the bad may be separated from the good.

In an action of debt on bond conditioned for the performance of several things, if one of them be void, yet the bond may be good for the others. Thus, in *Newman* v. *Newman*, 4 Mau. & Selw. 66, the bond was conditioned to pay money to the obligee upon the conveyance of an estate to the obligor, and to present the obligee's son to the next avoidance of a church the advowson of which belonged to the estate, if he were then of age to take it; or if not, to procure the person who should be presented, to resign upon notice of the son's being qualified to take it, and to present him; the Court held, that, admitting that part of the condition for the presentation of the obligee's son to be simoniacal, yet, by the rules of the common law, the bond was good for the payment of the money. Lord *Ellenborough* said, "admitting the condition of this bond to be ill as to one part of it, it seems that it may be well as to the other parts; for you may separate at the common law the bad from the good. Supposing, therefore, we hold it to be simoniacal so far as it regards the presentation of the son of the obligee, yet for the payment of the two sums

TO RESIGN RECTORY.

and should after-

virtue of and under the presentation of the said [*patroness*]: AND ALSO if the said [*parson*] shall afterwards reside and

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(mentioned in the condition) it is exempt from all vice. Therefore, that objection would not be a bar to this action."

A. D. 1811. Where it was doubtful whether the plaintiff, the incumbent, was not under two wills entitled to be presented free from any obligation; and, not being aware of his supposed right, he had given a bond to resign a living in favour of a particular person, and not to accept a bishopric, the Court refused to grant an injunction against an action on the bond.

In *Dashwood* v. *Peyton*, 18 Ves. 27, the question was, as to the validity of a bond of resignation of a living in favour of a particular person, and not, during his incumbency, to accept a bishopric†; and whether to be considered upon the principle of marriage-brokage bonds, as against public policy, or as a corrupt transaction, with reference to which the Court would not act. It appeared rather doubtful whether the plaintiff, the incumbent, was not under two wills entitled to be presented, free from any obligation; that, when he gave the bond, he was not aware of his right; and that he was induced to give the bond under a misrepresentation by a letter of a trustee, that there was no alternative; that they were bound to require a bond, not only for resignation, but also not to accept a bishopric. The bill prayed, that the defendant may be decreed to deliver up the bond to be cancelled, and an injunction against proceeding on it. Lord *Eldon* said, "the question, whether it was lawful to clog the presentation with these conditions, I shall not deal with in this Court." And he refused to grant an injunction.

In *Ex parte Rainier*, in *Rowlatt* v. *Rowlatt*, 1 Jac. & Walk. 280, a bond for the performance of a covenant to pay an annuity, until a person should be in the enjoyment of a benefice which he might hold during his life, of the yearly value of 600*l.*, was held to be satisfied by his induction to a living of that value, accompanied by a bond to resign in favour of either of two sons of the patron, when qualified to take it: but liberty was given to take the opinion of a Court of law. On the part of the parson, it was contended, that, having been presented on an undertaking to resign, and a bond being given to that effect, it was a benefice that could not have been retained for life. But Lord Chancellor *Eldon* said, "still he might have held it for life; he might, if he chose, have kept the living and forfeited the bond."

Bishop may refuse to accept resignation.

It seems to be clear that the bishop may refuse to accept a resignation, upon a sufficient cause for his refusal; but whether he can merely at his will and pleasure refuse to accept a resignation without any cause, and who shall finally judge of the sufficiency of the cause, and by what mode he may be compelled to accept, are questions involved in doubts. See 1 Bla. Com. 393, (39), Christian's edit.; 3 Burn's Eccles. Law, 322, 6th ed.; *Newdigate* v. *Helps*, 6 Madd. 133.

But obligor bound to procure bishop's acceptance, at all events.

But a parson bound in a bond to resign a living, must procure the bishop's acceptance at all events. *Hesketh* v. *Grey*, 3 Burn's Eccl. Law, 322; and see Cunningh. 107, 115.

† As to the effect of this, *vide ante*, Vol. 1, p. 178, n. (*f*).

shall continue to live and inhabit in and upon the said parish of [B.] for as long time as he the said [*parson*] shall continue rector and incumbent there, without procuring or accepting any qualification, licence, or dispensation from any person or persons whomsoever, whereby to dispense with his the said [*parson*]'s residence in or upon the said parish: AND ALSO if either of the said sons of the said [*patroness*] shall live to take holy orders, and in that event the said [*parson*] shall, upon request to him made by the said [*patroness*], or the owner for the time being of the advowson of the said rectory, at any time whilst such son so taking holy orders shall be qualified to hold the said living or rectory, effectually make void the admittance, institution, and induction of him the said [*parson*] unto the said rectory and church, by making a full and absolute legal resignation and renunciation of the same to the bishop of the diocese for the time being; *And* by procuring the said bishop to accept such resignation: *So* that the said [*patroness*], or the patron or patrons for the time being of the advowson of the said rectory and church, may present to the same such son of the said [*patroness*] so taking orders as aforesaid; free from the title, and all claims and demands of the said [*parson*] therein: *Or*, in case neither of the said sons of the said [*patroness*] shall take holy orders during the life of the said [*parson*]; *Then* the above-written bond or obligation shall be void, and of no effect; but otherwise shall be and remain in full force and virtue.

TO RESIGN RECTORY.

wards reside in the parish during his incumbency:

and if either of the two sons of patroness should live to take holy orders, and the obligee should, upon request, resign the rectory to the bishop;

and procure the bishop to accept such resignation; so that the patron may present such son;

free from all demands of obligee:

or in case no such son should take orders in obligee's life; then bond to be void.

See further, on bonds of resignation, Watson's Clergyman's Law, 36, 37, 4th ed. Gibson's *Codex Juris Ecclesiastici Anglicani*, 799, 800, 2d ed. Degge's Parson's Counsellor, 51, 6th ed. 3 Burn's Eccles. Law, 354, 6th ed. 6 Bac. Abr. 192, *Simony*, (B), &c. 1 Ibid. 644, *Conditions*, (K); 1 Fonbl. Treat. of Equity, 232; Com. Dig. *Esglise* (N. 3), *ad finem*.

TO RESIGN VICARAGE WHEN SON OF LESSEE IS COMPETENT.

BOND *to a Patron possessed of a Vicarage for Years, to resign the Living upon Request, when his Son shall be competent to take it, and in the mean Time not to be absent from the Living for more than Two Months in a Year. (To which is added the Forms of Resignation of a Benefice either before a Bishop, or before a Notary Public.)*

Obligation from one to one.

BOND from the Reverend [*parson*], of &c., clerk to [*patron*], of &c., Esquire, in [*double the value of the living for the parson's life*] pounds, *ut ante*, p. 179.

Recital that living is vacant by resignation; that patron intends to present obligee;

who has agreed to reside during his incumbency:

that patron has an infant son, whom he intends shall be a parson, and be presented to the living.

WHEREAS (*a*) the vicarage of [B], in the county of Devon, is now vacant by the resignation of the Reverend [*last vicar*]; and the said [*patron*], who is the present patron of the said vicarage, hath an intention to present the above-bounden [*parson*] to the said vicarage; *And* the said [*parson*] hath agreed to reside thereon while he shall be the incumbent thereof, without being absent more than two months in any one year. AND WHEREAS the said [*patron*] hath one son, who is now an infant, and it is the intention of the said [*patron*], that his said son shall be brought up as a clergyman, and be presented to the said vicarage as soon as he shall be capable to receive the same.

The circumstances on which the above bond was founded.

(*a*) The patron mentioned in the above bond, having four sons, the youngest of whom was not a year old, and wishing to educate one of them for the church, purchased a lease of the advowson for twenty-five years, and presented the obligee as a *locum tenens*, till one of his sons should be capable of being presented. [But the late act, it will be perceived, limits the number of persons in whose favour a bond of resignation can be made to two. *Ante*, p. 367.]

NOW THE CONDITION of the above-written obligation is such, that, if the said [*parson*] shall and do, during the time he shall hold the said vicarage, personally reside thereon, without being absent for more than two months in any one year: AND ALSO, in case the said son of the said [*patron*] shall live to attain the age of twenty four years, and to take priest's orders, according to the rites of the church of England, or be capable of taking priest's orders; and the said [*patron*], his executors or administrators, being the patron or patrons of the said vicarage, shall be thereupon minded to present the said [*son*] to the said vicarage, upon his being duly qualified; the said [*parson*] shall, within one calendar month after request made to him for that purpose by the said [*patron*], his executors or administrators, absolutely, and in due form of law, resign the said vicarage, and cause such resignation to be accepted, so that such vicarage may within such month become vacant: AND shall also, in the same month, give notice of such resignation to the said [*patron*], his executors or administrators (*b*); *Then* this obligation to be void, otherwise to remain in full force and virtue.

Condition that obligee shall not be absent from the living more than two months in a year:

that in case son of patron shall take priest's orders, or be capable of so doing,

then, if obligee should, within one month after request, resign living, and cause resignation to be accepted; and in the same month give patron notice of such resignation; bond to be void.

RESIGNATION (*c*).

RESIGNATION OF A BENEFICE BEFORE A BISHOP.

A Form of Resignation taken before a Bishop.

IN THE NAME OF GOD; *Amen.* BEFORE you the right reverend father in God R., by Divine Providence, Lord Bishop of London, and credible witness here present; [*parson*], vicar of ——, and in your lordship's diocese and jurisdiction, for certain just and lawful causes me hereunto specially moving, without compulsion, fraud, or deceit, *Do* hereby purely, simply, and absolutely give up and resign the said vicarage and parish church of ——, with all its rights, members, incidents, and appurtenances,

(*b*) See the clause added to the preceding form.

[(*c*) This form, it will be perceived, is not, since the late act (*ante*, p 369), applicable to the case of a resignation in pursuance of a previous bond or engagement, as that act requires that the resignation should refer to such bond or engagement, and state for whose benefit it is made.]

RESIGNATION OF A BENEFICE BEFORE A BISHOP.

into your lordship's sacred hands; with all my right, title, and possession of, in, and to the same; *And* humbly and expressly resign and cede them by these presents; *Humbly praying*, that your lordship would be graciously pleased to accept of this my cession and resignation, and pronounce and declare the said vicarage to be void and resigned to all intents and purposes; (*d*) (And to decree that an intimation of such avoidance and resignation may be issued to the patron thereof.) IN WITNESS whereof I have hereunto set my hand and seal the —— day of ——, in the year of our Lord 18—.

RESIGNATION OF A BENEFICE BEFORE A NOTARY PUBLIC.

RESIGNATION (*e*) *of a Vicarage or Rectory* (mutatis mutandis) *before a Notary Public, when the Bishop is absent.*

IN THE NAME OF GOD; *Amen.* BEFORE you [*notary*], the notary public underwritten, and the authentic and credible witnesses here present; [*parson*], clerk, rector of the parochial church of ——, in the county and diocese of ——, in the province of Canterbury, being willing and desirous, for certain true, just, and reasonable causes me hereunto specially moving, *Do*, by these presents, devest and totally exonerate myself from the burden, care, and government of the said rectory (*or* vicarage) of ——, and of the souls therein residing: AND not being compelled thereto by force, fear, fraud, or any other sinister design; but moved thereto by my certain knowledge, deliberate mind, and free will, *Do* hereby resign the said rectory of ——, with its rights and appurtenances, into the sacred hands of the right reverend father in God, ——, Lord Bishop of ——, or to his vicar general, or to whom else it shall appertain to admit of this my resignation; *And* by

(*d*) If the right of presentation is vested in the bishop, leave out the words in parentheses.

There are resignations in consideration of permutations, which are easily changed from the above by declaring the acceptance (*of the person resigning*) of the other.

(*e*) This resignation must be brought, read, and executed before a notary public, who subscribes his name thereto, and the day of the date, &c.

these presents, openly, publicly, and expressly give up and resign all my right, title, and possession of, in, and to the same. IN WITNESS whereof I have hereunto set my hand and seal, in the presence of (*the witnesses, &c.*)

RESIGNATION OF A BENEFICE BEFORE A NOTARY PUBLIC.

BOND *to resign a Rectory when the Patron's Protege*(*a*) *shall be fit to be presented.*

TO RESIGN WHEN PATRON'S PROTEGE SHALL BE FIT.

BOND from [*parson*], of &c., clerk, to [*patron*], of &c., esquire, in the sum of 3,000*l. ut ante*, p. 179.

Obligation from one to one.

WHEREAS the rectory of the church of [——], in the county and diocese of [——], is now vacant by the death of the reverend [——], the last incumbent; and the above-named [*patron*], the undoubted patron of the said rectory and church, intends, by writing under his hand and seal, bearing even date with the above-written obligation, to present (*b*) the above-bound [*parson*] to the bishop of the said diocese, to the end that the said [*parson*] may be admitted, instituted, and inducted into the said rectory and church.

Recital that rectory is vacant by death of last incumbent:

that patron intends to present obligee to the bishop.

NOW THE CONDITION of the above-written obligation is such, *That*, if the above-bound [*parson*] shall be admitted and instituted, and inducted into the said rectory and church, upon the said presentation; *Then*, if he do and

Condition, that, if obligee should be inducted, and should, when patron's protege shall be fit to be

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[(*a*) It should seem that, since the late act, if the bond be in favour of *one* person only, he need not be related to the patron. *Vide* stat. 9 Geo. 4, c. 94, *ante*, p. 367].

[(*b*) It will be perceived, that the late act (*ante*, p. 367) requires that the bond should precede the presentation. The forms in the text, therefore, in all which the presentation was recited as *already* made, have been altered in this respect.]

TO RESIGN WHEN PATRON'S PROTEGE SHALL BE FIT.

shall, when and so soon as [*protege*], the son of [——], shall be of proper age, and in orders fit to be presented to the said church, make a full, absolute, and legal resignation of the said rectory and church, to the bishop of the said diocese for the time being, and procure such resignation to be accepted; so that the said [*patron*], or the patron or patrons of the said rectory for the time being, may present the said [*protege*] to be rector of the said church; *Then* the above-written obligation shall be void and of no effect; but otherwise shall be and remain in full force and virtue.

presented, resign living, and procure bishop to accept resignation;

bond to be void.

TO SECURE INCUMBENCY TO INCUMBENT FOR HIS LIFE.

BOND *from the Purchaser of an Advowson to secure the Incumbency to the Vendor, the present Incumbent, for his Life* (*a*).

Obligation from one to one.

BOND from [*purchaser*], of &c., esquire, to [*vendor*], of &c., clerk, in —— pounds, *ut ante*, p. 179.

Recital of contract for sale of advowson in fee, subject to the incumbency of the vendor.

WHEREAS the above-named [*parson*], being seised or well entitled in fee simple of or to the perpetual advowson, right of patronage, and presentation, of and to the rectory of the parish church of ——, in the county of ——, now being full by his own incumbency, lately contracted and agreed with the above-bounden [*purchaser*] for the absolute sale thereof to him in fee simple, at or for the price or sum of —— pounds; *subject* to the incumbency of the said [*parson*] thereon, during his life: which incumbency it was agreed should be renewed for that purpose, in manner hereinafter mentioned. AND WHEREAS, in pursuance of the said recited agreement, by an indenture bearing date the day next before the day of the date of the above-written bond, and made, or expressed to be made, between the said [*parson*], of the one part, and the said

Recital of conveyance of advowson to purchaser.

(*a*) Vide *Newman* v. *Newman*, 4 Maule & Selw. 66, *ante*, p. 373.

[*purchaser*], of the other part; in consideration of the sum of —— pounds to the said [*parson*], paid by the said [*purchaser*], *he* the said [*parson*] hath granted, bargained sold, and confirmed unto the said [*purchaser*], his heirs, and assigns, *All that* the advowson, right of patronage, presentation, and free disposition, of, in, and to the rectory of the parish church of ——, in the said county of ——, with all the rights, members, and appurtenances thereunto belonging; *And also* all and all manner of tithes of what nature or kind soever, yearly growing, arising, or renewing in the parish of —— aforesaid; and which then, or then late were in the tenure of [*tenant*], his assigns or undertenants, at the yearly rent of —— pounds. *To hold* the same, *unto and To the use* of the said [*purchaser*], his heirs and assigns for ever. AND WHEREAS, in order to carry into execution such part of the said recited contract as concerns the securing the incumbency of and in the rectory of the parish church of —— aforesaid to the said [*parson*], for and during the term of his natural life, it was agreed by and between the said contracting parties, that the said [*purchaser*] should execute the above-written bond, with such a condition thereunder written as hereinafter is contained.

TO SECURE INCUMBENCY TO INCUMBENT FOR HIS LIFE.

That, in order to carry into execution contract respecting the incumbency, it was agreed that purchaser should execute the bond.

NOW THEREFORE THE CONDITION of the above-written obligation is such, *That,* if the said [*parson*] shall remain and continue the incumbent of the rectory of the parish church of —— aforesaid, during his life; OR else, if the said incumbency shall become void, by the resignation, cession, deprivation, or other avoidance of him the said [*parson*], or by his accepting any other ecclesiastical benefice; *Then,* if the said [*purchaser*], his heirs or assigns, do and shall again present, nominate, and appoint the said [*parson*] to the said rectory of the parish church of —— aforesaid; and so from time to time, as often as such resignation, cession, deprivation, acceptance, or other avoidance shall happen during the life of the said [*parson*]; *The* above-written bond or obligation shall be void and of no effect, or else to remain in full force and virtue.

Condition that if vendor should continue incumbent during his life; or if incumbency should become void;

if purchaser should again present vendor;

and so *toties quoties:*

bond to be void.

[*The three following precedents, with the accompanying notes, have been added to the present edition.*]

LEGATEE OF LEASEHOLDS TO EXECUTOR.

[BOND *from the* LEGATEE *of* LEASEHOLDS, *to an* EXECUTOR, *conditioned to* INDEMNIFY *the Testator's* ESTATE *against the* RENT *and* COVENANTS; *and also against any Loss by reason of* DEFICIENCY *of* ASSETS *or* OTHERWISE.

KNOW ALL MEN, &c., *ut ante*, p. 179.

WHEREAS, (*Recite Lease granted to Testator, and also his Will, ut ante*, p. 277). AND WHEREAS the said [*legatee*] having called upon and requested the said [*executor*] to assign (*a*) to him the said leasehold premises bequeathed by the hereinbefore recited will of the said [*testator*], deceased, as aforesaid; the said [*executor*] has consented so to do, upon the said [*legatee*] entering into the above-written bond or obligation, with the condition hereinafter contained; and accordingly, by an indenture bearing even date herewith, made between the said [*executor*] of the one part, and the said [*legatee*] of the other part, the said [*executor*] has assigned unto the said [*legatee*], his executors, administrators, and assigns, the said leasehold —— and premises bequeathed to him in and by the said recited will as aforesaid, *to hold* unto the said [*legatee*], his executors, administrators, and assigns, for all the residue now unexpired of the said term of —— years therein.

Condition.

NOW THE CONDITION of the above-written bond or obligation is such, that, if the said [*legatee*], his executors, administrators, or assigns, should henceforth, and at all times hereafter, during the continuance of the said

(*a*) An assignment is not necessary from an executor to a legatee, in order to vest the property in the latter; an assent is sufficient *Vide ante*, Vol. 2, p. 640. Assignments, however, are frequently made for this purpose.

LEGATEE OF LEASEHOLDS TO EXECUTOR.

term granted by the said hereinbefore recited indenture of lease, well and truly pay the rent and perform the covenants and agreements reserved and contained by and in the same indenture, and which on the part of the lessee therein named, his executors, administrators, or assigns, are and ought to be paid and performed, and should at all times and for ever hereafter keep harmless and indemnified the said [*executor*], his executors and administrators, and other the personal representative or representatives for the time being of the said [*testator*], deceased, from and against all costs, damages, and expenses, which he or they shall or may sustain or incur, by reason of the said rent, covenants, and agreements, or any of them; and also if the said [*legatee*], his heirs, executors, or administrators should at all times for ever hereafter keep harmless and indemnified the said [*executor*], his executors and administrators, and other the representative or representatives for the time being of the said [*testator*], deceased, from and against all costs, damages, and expenses, which he or they shall or may incur, sustain, or be put unto, by reason of any claims or demands which shall hereafter be made by any creditor or creditors of the said [*testator*], deceased, against the said [*executor*] or other the representative or representatives of the said [*testator*], as aforesaid, in respect of the said leasehold premises (*b*), and all other costs,

What indemnity the executor of a lessee is entitled to from a legatee, against the rent and covenants.

(*b*) This clause of the bond may be added, *ex abundanti cautela*, even where there is no reason to suspect a deficiency of assets, as latent claims may be discovered. It is not quite clear to what species of indemnity an executor is entitled from a legatee, against the rent and covenants in a lease granted to his testator. That he is entitled to *some* indemnity is evident, since he would clearly be liable for damages on a breach of covenant by the legatee, to the extent of the assets which have come to his hands, and which have not been applied in satisfaction of debts†. A question of this kind was much discussed in the case of *Simmons* v. *Bolland*, 3 Mer. 547; where a bill was filed by a residuary legatee, against an executor, for the recovery of the property bequeathed to him, part of which consisted of a leasehold estate demised to the testator by the corporation of Canterbury, subject to certain rent and covenants. The executor sub-

† As to the liability of the executors or administrators of lessees, see *post*, Vol. 4, p. 392.

LEGATEE OF LEASEHOLDS TO EXECUTOR.

damages, and expenses, which he or they shall sustain, incur, or be put unto, by reason of the said [*executor*],

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mitted that he was entitled to retain the property for the purpose of protecting himself from any claim which might be made against him, as the executor of the deceased lessee, in respect of the rent and covenants: Sir *W. Grant*, M. R., decided against him on this point. "The equitable relief sought in this case," said this excellent Judge, "depends upon a legal question, whether an executor can safely make payment of legacies, or deliver over a residue, while there is an outstanding covenant of his testator, which has not yet been, and never may be broken. This question was very much discussed in a case of *Eeles* v. *Lambert*, reported both by Styles and by Aleyn; (Styles, 37, 54, 73; Aleyn, 38, *S. C.*); the ultimate judgment in which is not however stated by either. There is also a case of *Nector & Sharp* v. *Gennet*, in Cro. Eliz. 466; where the same question arose, though in a different shape. A legatee sued in the ecclesiastical court for his legacy; the executors pleaded that the testator, who was keeper of a prison, was bound in an obligation to the sheriff (to an amount exceeding the entire value of his property), for the safe keeping of the prisoners committed to his charge; which obligation had become forfeited in consequence of a judgment against the sheriffs on an action for an escape; and the executors had therefore nothing in their hands to answer the demand. The plea was disallowed, whereupon a prohibition was sued, which being demurred to, the defendant prayed a consultation. Upon this the principal question was, whether the escape was such that the sheriff was suable in respect of it: for, if not, the bond was not forfeited; and, if the bond was not forfeited, then it was said to be plain that the legacy should be first paid; and, to this purpose, it was argued, that, by the civil law, the legatary must enter into a bond, to make restitution if the obligation should be afterwards recovered; so there was no inconvenience to any: to which the whole Court agreed, and determined that it was no plea, unless the obligation was forfeited. *Coke* said, "The difference is, when the obligation is for the payment of a lesser sum at a day to come, it shall be a good plea against the legatee before the day; for it is a duty maintenant which is in the condition, (as 9 E. 4, 12). But otherwise it is, where a statute or obligation is for the performance of covenants, or to do a collateral thing. There, until it be forfeited, it is not any plea against a legatee, for peradventure it shall never be forfeited, and may lie *in perpetuum*, and so no will should be performed." The majority of the judges being of opinion that there was no forfeiture, a consultation was awarded, the effect of which, as far as it regards the present question, was to leave the spiritual court to proceed according to their own established course—namely, to compel the legatee to give security to re-

having parted with or assigned the said leasehold —— and premises, to the said [*legatee*], as hereinbefore recited, *Then* the above-written obligation, &c.] LEGATEE OF LEASEHOLDS TO EXECUTOR.

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fund the legacy, in case of the executor's becoming afterwards liable to be sued upon the bond. In the argument of *Eeles* v. *Lambert*, this case is noticed by *Rolle*, Justice. "It was *Nector & Sharp's* case, 38 Eliz., that legacies ought to be paid conditionally, viz. to be restored if the covenant should be broken." Styles, 56.

In *Hawkins* v. *Day*, Amb. 160, Lord *Hardwicke* makes a distinction between simple contract debts and legacies; and seems to entertain a clear opinion that even an unbroken covenant renders it unjustifiable for an executor to pay a legacy. I see no reason to doubt the accuracy of Ambler's report of this case; for his statement is found to correspond with the Register's book; and although, in the order over-ruling the exceptions, particular legacies are specified, yet it appears, by a reference which has been made to the Master's report, that they were the only legacies stated to have been paid; and they must have been paid before the forfeiture by breach of the covenants, Lord *Hardwicke* stating the question with respect to them to be, "whether payment of the assets, before there was any breach of the condition, ought to be allowed as a good administration of the effects." *In this state of the authorities, it would be too much for me to order the executor to transfer and pay without having security given him*, in case of judgment being recovered against him at law, for any future breach of the covenant. No decree that I can make will bind the corporation of Canterbury, or protect the executor against their demand, if the bond should hereafter be forfeited. All that I can do is to order the funds to be made over, on the plaintiff *giving a sufficient indemnity;* and it must be referred to the Master to settle the terms of such security.

It does not appear what was the nature of the security settled by the Master in the preceding case. Indeed, the editor has been informed that the case was compromised before any further proceedings were taken. There is certainly some difficulty in saying what the indemnity ought to be in such a case. A bond may, it is obvious, be a very inadequate protection; for, even if the parties who are to give it are solvent at the time, they may not continue so, and the danger to be provided against extends through the whole period of the lease, so that any security on the estate itself, which seems to be the only other mode of security, would prevent the legatee from *ever* having the absolute dominion over the property.

FROM PRINCIPAL TO SURETY IN A BOND.

[COUNTER BOND *by a* SURETY *to a* PRINCIPAL.

KNOW ALL MEN &c., *ut ante*, p. 179.

WHEREAS by a bond or obligation bearing even date herewith, the above-bounden [*obligor*], and the above-named [*obligee*], became jointly and severally bound unto [*creditor*], his executors or administrators, in the penal sum of —— pounds, with a condition thereunder written for making void the same bond if the said [*obligor*] and [*obligee*], or either of them, their, or either of their executors or administrators, should pay or cause to be paid unto the said [*creditor*], his executors or administrators, the sum of —— pounds, with interest from the date thereof, at the rate of five pounds *per cent. per annum*, on the —— day of —— next, without making any deduction whatsoever: AND WHEREAS, the said [*obligee*] executed the said bond at the request of, and as surety for, the said [*obligor*], and on his the said [*obligor's*] agreeing to execute to the said [*obligee*] the above-written bond with the condition hereinafter contained.

NOW THE CONDITION of the above-written bond or obligation is such, that, if the said [*obligor*], his heirs, executors, or administrators, shall duly and punctually pay to the said [*creditor*], his, executors, or administrators, the said sum of —— pounds, and the interest thereof, according to the condition of the hereinbefore recited bond, or in case he or they shall fail or neglect so to do, then, if the said [*obligor*], his heirs, executors, or administrators, shall pay and reimburse unto the said [*obligee*], his heirs, executors, or administrators, all sums of money, costs, charges, damages, and expenses, which the said [*obligee*], his heirs, executors or administrators, shall or

may at any time or times hereafter, pay, sustain or incur, by reason of the non-payment by him the said [*obligee*], his heirs, executors, or administrators, of the hereinbefore recited bond, together with interest, at the rate of five pounds *per cent. per annum*, on such sums of money, costs, charges, damages, or expenses, from the time or respective times of the payment or advancement thereof, then the above-written obligation shall be void; but otherwise shall be in full force and virtue (*a*).]

FROM PRINCIPAL TO SURETY IN A BOND.

(*a*) It has been decided in a recent case, *Copis* v. *Middleton*, 1 Turn. 224, (in opposition to several antecedent decisions, *Gayner* v. *Royner*, 1777, cit. 2 Madd. 437; *Hotham* v. *Stone*, 1 Turn. 226, n.; *Robinson* v. *Wilson*, 2 Madd. 434), that a surety paying off a bond debt becomes a simple contract creditor merely of the principal. Hence the necessity of the bond in the text, in order to place him in the situation of a specialty creditor.

Surety paying bond debt, a simple contract creditor only of principal.

[BOND *by a* VENDOR *to a* PURCHASER, *conditioned to substantiate a Title to the* REDEEMED LAND TAX (*a*), *within Six Calendar Months.*

BY VENDOR TO REDEEM LAND-TAX.

KNOW ALL MEN &c., *ut ante*, p. 179.

WHEREAS the above-bounden [*obligee*], lately contracted and agreed with the above-named [*obligor*], to

(*a*) As the subject of the land-tax and its redemption is intimately connected with conveyancing, it has been thought that part of the space occupied in the former edition by the discussion respecting bonds to compel the resignation of ecclesiastical livings (which has been omitted in the present, *vide ante*, p. 362), might be usefully devoted to a statement of some of the material clauses in the acts imposing the land-tax and regulating its redemption.

LAND TAX.

LAND TAX.

The land-tax originated in the reign of William the Third, and was

BY VENDOR TO REDEEM LAND-TAX.

purchase of him a certain farm, called ——, in the parish

one of the imposts which were created (in substitution for the more arbitrary and unconstitutional exactions of his predecessors), for the purpose of enabling this monarch to carry on the war against France. It was first enacted for a year only, and, in consequence of the jealousy of Parliament, continued to be annual until the year 1798, when Mr. Pitt introduced his well known measure for rendering the land-tax perpetual, subject to redemption. The tax now subsists under the stat. 38 Geo. 3, c. 5, which was the act in force when the perpetuating stat. 38 Geo. 3, c. 60, was passed, and which, after assessing the counties, cities, and some other local districts in England and Wales, in certain sums, enacts, "That all and every manors, messuages, lands, and tenements, and also all quarries, mines of coal, tin, and lead, copper, mundic, iron, and other mines; iron mills, furnaces, and other iron works; salt springs, and salt works; all alum mines and works; all parks, chaces, warrens, woods, underwoods, coppices; and all fishings, tithes, tolls, annuities, and all other yearly profits; and all hereditaments, of what nature or kind soever they be, situate, lying, and being, happening, or arising, within the several and respective counties, cities, boroughs, towns, or places aforesaid, respectively, or within any parts of the same, as well within ancient demesne, and other liberties and privileged places, as without, within that part of Great Britain called England, Wales, or Berwick, as aforesaid; and all and every person and persons, bodies politic and corporate, guilds, mysteries, fraternities, and brotherhoods, whether corporate or not corporate, having or holding any such manors, &c. in respect thereof; shall be chargedwith as much equality and indifference as is possible, by a pound rate, for or towards the said several and respective sums by this act set or imposed, or intended to be set and imposed, for and upon all and every such counties, &c., hereby charged therewith as aforesaid."

Stat. 38 Geo. 3, c. 5.

Lands, tenements, mines, &c.

to be charged with land-tax.

Rent, charges, annuities, &c., to be rated.

Sect. 5. "And whereas many of the manors, messuages, lands, tenements, tithes, hereditaments, and premises, in England, Wales, and Berwick-upon-Tweed, intended by this act to be charged with a pound-rate as aforesaid, stand incumbered with, or are subject or liable to the payment of, several rent-charges, or annuities, or other annual payments, issuing out of the same, or to the payment of divers fee-farm rents, rents-service, or other rents thereupon reserved or charged, by reason whereof the true owners and proprietors of such manors, &c., do not in truth receive to their own use the true yearly value of the same, for which nevertheless they are by this act chargeable with a certain pound-rate; it is therefore declared and enacted by the authority aforesaid, that it shall and may be lawful to and for the landlords, owners, and proprietors of such manors, &c., in England, Wales, and Berwick-upon-Tweed, being charged with a pound-rate as aforesaid, to abate and deduct, and to detain

of ——, in the county of ——, containing —— acres, or

BY VENDOR TO REDEEM LAND-TAX.

and keep in his, her, or their hands, out of every such fee-farm rent, or other annual rent or payment, so much of the said pound rate, which shall be taxed or assessed upon the said manors, &c., as a like rate for every such fee-farm rent, or any other annual rent or payment respectively, shall by a just proportion amount unto, so as such fee-farm rent or other annual rent or payment respectively, do amount unto twenty shillings *per annum*, or more; and all and every person or persons, who are or shall be any ways entitled to such rents or annual payments, their respective auditors, reeves, receivers, and their deputy or deputies, are hereby required to allow such deductions and payments, according to such rates, upon receipt of the residue of such monies as shall be due and payable to them for such rents or annual payments reserved or charged as aforesaid, without any fee or charge for such allowance †.

As to the liability of owners of fee-farm rents to contribute to the land-tax.

† The adjustment of the proportions of the land-tax between the owner of land and of a fee-farm rent issuing out of it, must, it is obvious, be a source of frequent dispute. By stat. 38 Geo. 3, c. 60, sect. 16, and 42 Geo. 3, c. 116, sect. 35, therefore, power is given to the commissioners to adjust these proportions. Another question which sometimes arises is, whether the person creating the charge, intended the donee to take it exempt from any deduction on account of land-tax. Upon this point, it has been held, that where A. granted a fee-farm rent to B., "without any deduction, defalcation, or abatement, for or in any respect whatsoever," the grantee was not liable to land-tax, under stat. 4 W. & M. c. 1, the provisions of which are transcribed into the subsequent acts. *Bradbury* v. *Wright*, Doug. 624.

It will be observed that the clause *supra* applies only to lands, &c., which "*stand*" incumbered with, or "*are*" subject to, the payment of rents, &c., and these words, it should seem, would not extend to rents, which were not in *esse* at the passing of the act; and as the subsequent act of 38 Geo. 3, c. 60, only renders perpetual the duty which was then payable under the existing act, it cannot, it is conceived, have the operation of extending the provision in question to rents subsequently created. The editor, however, distrusts his impressions upon this point, because in practice it has been invariably considered, that the clause in question does apply to such rents; and this undoubtedly was the intention of the framers of the act, or rather would have been their intention, if the point had been presented to their notice. Unless, however, some passage can be shewn in the subsequent acts, which has the effect of charging fee-farm rents, subsequently created, there is strong ground to contend that no land owner can claim a reduction in respect of any rent charge not in existence when

BY VENDOR TO REDEEM LAND-TAX.

thereabouts, for an estate of inheritance in fee simple, for

By section 17, collectors may levy by distress, in case of refusal of payment†. Distress to be kept four days at the owner's charge; and then to be appraised and sold, and the overplus returned, &c. Commissioners to determine differences about distress. For want of distress, offenders (not being peers of Great Britain) may be committed. "And the several and respective tenant or tenants of all houses, lands, tenements, and hereditaments, in England, Wales, or Berwick-upon-Tweed, which shall be rated by virtue of this act, are hereby required and authorized to pay such sum or sums of money as shall be rated upon such houses, lands, tenements, or hereditaments, and to deduct out of the rent so much of the said rate as, in respect of the said rents of any such houses, lands, tenements, and hereditaments, the landlord should and ought to pay and bear: And the said landlords, both mediate and immediate, according to their respective interests, are hereby required to allow such deductions and payments, upon receipt of the residue of the rents.

Tenants to pay the tax,

and deduct it out of the rents.

Sect. 18. "That every tenant paying the said assessment or assessments last mentioned, shall be acquitted and discharged of so much money as the said assessment or assessments shall amount unto, as if the same had actually been paid unto such person or persons to whom his rent shall have been due and payable; and if any difference shall arise between landlord and tenant, or any other, concerning the said rates, in England Wales, or Berwick-upon-Tweed, the said several commissioners, or any two or more of them, in their several divisions, shall have, and they have hereby power to settle the same, as they shall think fit.

Tenants discharged for what they so pay.

Commissioners to settle differences between landlord and tenant.

Sect. 24. "That no privileged place or person, body politic or corporate, within the counties, ridings, cities, and towns aforesaid, in England, Wales, and Berwick-upon-Tweed, shall be exempted from the said assessments and taxes; but that they, and and every of them, and also all fee-farm rents, and all other rents, payments, sum and sums of money, and annuities, issuing out of or payable for any lands, shall be liable towards the payment of every sum by this act to be taxed and levied; and all such tenants are hereby directed and authorized to pay them proportionably, according to the rates and assessments by this act directed and appointed; and all such tenants shall be hereby saved and kept harmless by the authority of this act, from any further payment of any such pro-

No privileged place or person exempt from this tax. Fee-farm rents, &c., to be taxed.

Tenants to pay the rates.

the act of 38 Geo. 3, c. 5, was passed; and even if the general terms of the 4th sect. might otherwise be construed as extending to fee-farm rents, the 5th section, which is expressly applicable to them, would afford an argument against that construction. The point is of less importance than it would otherwise be, because generally the terms used in creating a rent-charge would exempt it from its liability to contribute to the land-tax.

† As to the previous demand requisite, see *Gibbs* v. *Stead*, 8 B. & C. 528.

the price or sum of —— pounds, and it was represented

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portion of such rent, rents, sums of money, or annuities, to any person or persons to whom any such rent, rents, sums of money, or annuities, as aforesaid, should or ought to be paid, to all intents and purposes whatsoever, as fully and amply as if they had paid the same to any person or persons to whom the same is or are reserved or become due.

Colleges, &c., in the universities, &c., not chargeable;

Sect. 25. "That nothing in this act contained shall extend to charge any college or hall in either of the two universities of Oxford or Cambridge, or the colleges of Windsor, Eaton, Winton, or Westminster, or the corporation of the governors of the charity for the relief of the poor widows and children of clergymen, or the college of Bromley, or any hospital in England, Wales, or Berwick-upon-Tweed, for or in respect of the scites of the said colleges, halls, or hospitals, or any of the buildings within the walls or limits of the said colleges, halls, or hospitals; or any master, fellow, scholar, or exhibitioner of any such college or hall, or any reader, officer, or master of the said universities, colleges, or halls; or any masters or ushers of any schools in England, Wales, or Berwick-upon-Tweed, for or in respect of any stipend, wages, rents, profits, or exhibitions whatsoever, arising or growing due to them in respect of the said several places or employments in the said universities, colleges, or schools; or to charge any of the houses or lands which, on or before the 25th day of March, 1693, did belong to the scites of any college or hall in England, Wales, or Berwick-upon-Tweed, or to Christ's Hospital, Saint Bartholomew, Bridewell, Saint Thomas, and Bethlehem Hospitals, in the city of London, and borough of Southwark, or any of them; or to the said corporation of the governors of the charity for the relief of the poor widows and children of clergymen, or the college of Bromley; or shall extend to charge any other hospitals or alms-houses in England, Wales, or Berwick-upon-Tweed, for or in respect only of any rents or revenues which, on or before the said 25th day of March, 1693, were payable to the said hospitals or alms-houses, being to be received and disbursed for the immediate use and relief of the poor of the said hospitals and alms-houses only.

or any of the houses or lands which, before March 25, 1693, did belong to Christ's Hospital, &c., or to the Corporation for relief of Clergymen's sons, &c., or Bromley college, or any other hospitals, &c.

No tenants of hospitals, &c., to claim any exemption.

Sect. 26. "That no tenants that hold and enjoy any lands or houses by lease or other grant from the said corporation, or any of the said hospitals or alms-houses, do claim or enjoy any freedom, exemption, or advantage by this act; but that all the houses and lands which they so hold, shall be rated and assessed for so much as they are yearly worth, over and above the rents reserved and payable to the said corporation, or to the said hospitals or alms-houses, to be received and disbursed for the immediate support and relief of the poor of the said hospitals and alms-houses.

Such tenants not discharged who by leases are

Sect. 27. "That nothing in this act contained shall be construed or taken to discharge any tenant of any of the houses or lands belong-

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to the said [*obligee*], at the time of his entering into such

obliged to pay taxes.

ing to the said colleges, halls, or hospitals, alms-houses, or schools, or any of them, who, by their leases or other contracts, are and do stand obliged to pay and discharge all rates, taxes, and impositions whatsoever; but that they, and every of them, shall be rated, and pay all such rates, taxes, and impositions; any thing in this act contained to the contrary notwithstanding.

Contracts between landlord and tenant touching taxes, not to be avoided.

Sect. 35. "That nothing in this act contained shall be construed to alter, change, or determine or make void, any contracts, covenants, or agreements whatsoever, between landlord and tenant, or any other persons, touching the payment of taxes and assessments, in England, Wales, and Berwick-upon-Tweed; any thing herein contained to the contrary notwithstanding.

By sect. 40, where lands, &c., are unoccupied, and no distress found, collectors may distrain at any time after.

By sect. 41, wood may be cut down and sold for distress, at seasonable times, timber trees excepted.

By sect. 42, tithes, tolls, &c., if assessment not paid within six days after demand, &c., may be seized and sold.

Redemption of Land-tax.

The first general redemption act was stat. 38 Geo. 3, c. 60†, which was repealed by the stat. 42 Geo. 3, c. 116, the provisions of which are for the most part in force at this day.

Who may redeem.

Corporations, and trustees for public purposes, empowered to contract.

Sect. 9, enacts, "That it shall be lawful for all bodies politic and corporate, and companies, notwithstanding any statutes of mortmain or other statutes or acts of parliament to the contrary, and for all feoffees or trustees for charitable or other public purposes, having any estate or interest in any manors, messuages, lands, tenements, or hereditaments, whereon any land-tax shall be charged, to contract and agree for the redemption of such land-tax, or any part thereof.

All persons interested em-

Sect. 10. "That it shall also be lawful for all other persons having any

As to stat. 38 Geo. 3, c. 60.

† As much land-tax was redeemed under this act, it is often necessary in the examination of titles to have recourse to it, to ascertain the sufficiency of contracts for redemption. One respect in which this act materially differed from the present was, that land-tax purchased under it continued to be payable to the Receiver-General as before, and was paid by him to the purchaser, to whose representatives it went as personal estate, whereas it will be seen that, under the present act (*vide* sect. 154), a person purchasing the land-tax is entitled to a fee-farm rent out of the lands, equal to the amount of the land-tax, and which devolves upon his representatives as *real* estate.

contract, that the land-tax in respect of the said farm had

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estate or interest in any manors, &c., whereon any land-tax shall be charged (except tenants at rack rent for any term of years, or from year to year, or at will, and except tenants holding under the crown any lands or tenements within the survey and receipt of the exchequer, or the duchy of Lancaster, or under the duke of Cornwall, any lands or tenements belonging to and parcel of the duchy of Cornwall, for any term of years, or from year to year, or at will) to contract and agree for the redemption of such land-tax, or any part thereof.

powered to contract (except tenants at rack rent, or tenants for years or at will, or tenant of crown lands, &c.)

Sect 11. "That where two or more persons shall be seised or entitled in undivided shares and proportions, either as co-parceners, heirs, portioners, tenants in common, or joint tenants, of or to any manors, &c., it shall be lawful for any one or more of such persons to contract and agree for the redemption of his, her, or their proportion of the land-tax charged thereon, in the same manner as if such proportion of land-tax had been separately charged on such manors, &c., and as if such person or persons was or were solely seised or entitled of or to the same; and if any one or more of such person or persons who shall be so seised or entitled in undivided shares or proportions as aforesaid, shall neglect or refuse to redeem his, her, or their proportion or proportions of the land-tax charged on such manors, &c., then and in such case it shall be lawful for any other or others of such persons (after giving three calendar months' notice of his, her, or their intention, to the person or persons so neglecting or refusing as aforesaid) to contract and agree for the redemption of the proportion or proportions of the person or persons so neglecting or refusing to redeem, of and in such land-tax.

Any one or more of co-parceners, &c., may contract for redemption of their own proportion, and for the proportions of others refusing, on three months' notice. See also sect. 39, 93, 124.

By sect. 12, canal companies, &c., are empowered to contract, or proprietors for their proportions, &c., of land-tax, as well on the tolls as on lands.

By sect. 13, sharers in water-works, insurance-offices, lights, stock in king's printing-office, companies of merchants in London, and the bank, are empowered to contract, &c.

Sect. 14. "That it shall be lawful for all committees and curators of lunatics or of idiots, and for all tutors and guardians of infants, and for all persons having authority to act for infants, married women, and other persons incapable of acting for themselves, to contract and agree, on behalf of such lunatics, idiots, infants, married women, and other persons incapable of acting for themselves, for the redemption of any land-tax hereby or by the said first recited act†, made redeemable, which such lunatics, &c., or other persons incapable of acting for themselves, could or might have redeemed by virtue of this act, if they respectively had not been under any incapacity; and it shall also be lawful for all trustees to contract and

Committees, trustees, &c., empowered to contract for lunatics *cestui que trusts*, &c. And see sect. 53.

† *i. e.* the act of 38 Geo. 3, c. 5.

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been redeemed; but, upon the investigation of the title of

agree in like manner on behalf of the persons for whom they shall be trustees, for the redemption of any land-tax hereby made redeemable, which shall be charged on any manors, &c., or other property of which they shall be trustees.

By sect. 15, governors of queen Anne's bounty may contract where incumbents have not.

By sect. 16, trustees for poor clergy may contract.

By sect. 17, colleges and other patrons of livings may contract where incumbents have not redeemed.

Corporations and persons before described shall have the preference till June 24, 1803, unless they decline. (See sect. 152).

Sect. 18. " That all such bodies politic and corporate and companies, and feoffees or trustees for charitable or other public purposes, and other persons hereinbefore described and empowered to contract for the redemption of any land-tax, (whether in respect of any such estate, right, or interest, or otherwise as aforesaid), shall be entitled so to contract for such land-tax in preference to all other bodies politic and corporate, and persons whatever, not having any estate or interest therein, provided they shall contract on or before the 24th day of June, 1803.

By sect. 19, corporations, trustees, and persons in possession (except certain tenants) shall be preferred to those in reversion, till Dec. 25th, 1802; and those in reversion, to all having no interest till said June 24th, 1803.

After June 24, 1803, parties entitled to preference may redeem on the same terms except as to periods of transfer, (see sect. 25), if no other offer shall have been made. (See sect. 151).

Sect. 20. " That all bodies politic and corporate, and companies, and feoffees or trustees for charitable or other public purposes, and other persons to whom such benefit of preference is given until the 24th day of June, 1803, as aforesaid, may at any time thereafter contract and agree for the redemption of the land-tax charged on their respective manors, messuages, lands, tenements, or hereditaments, wherein they shall have any estate or interest as aforesaid, in the same manner and under the same terms and conditions (except as to the period allowed for the transfer or payment of the consideration) as such bodies politic or corporate, or companies, or feoffees or trustees, or other persons, may do prior to the said 24th day of June, 1803, provided no offer shall have been made for the purchase of such land-tax, in pursuance of the provisions hereinafter contained: Provided also, that when any bodies politic or corporate, or companies, or other persons having any such estate or interest as aforesaid, shall at any time after the said 24th day of June, 1803, give notice in writing to the respective commissioners acting in the execution of this act as aforesaid, of their intention to redeem their land-tax, such land-tax shall not be sold to any other bodies politic or corporate, or companies, or persons, not having any estate or interest therein, until after the expiration of three calendar months from the date of such notice as aforesaid; and if parties in possession give such notice, they shall (except in certain cases) be preferred to parties in reversion. [*But this preference of persons in possession, is taken away by stat.* 53 *Geo.* 3, *c.* 123, *sect.* 2].

If parties interested give notice of intent to redeem, land-tax shall not be sold to others for three months.

the said [*obligor*] to the said farm, preparatory to carry- BY VENDOR TO REDEEM LAND-TAX.

By sect. 21, where corporations, &c., shall treat for sale of lands, held under demise from them, and obtain a certificate from two commissioners, (appointed under the great seal) they may, during the period specified therein, be preferred to the beneficial lessees, on producing such certificate to commissioners of sale under this act.

Terms of Redemption.

By sect. 22, consideration for redemption; viz. so much stock in 3 *per cents.* as will produce a dividend exceeding the amount of the land-tax redeemed by one-tenth.—[57 Geo. 3, c. 100.]

By sect. 23, where the land-tax to be redeemed in any place, for which separate commissioners are appointed, shall not exceed 25*l. per ann.* consideration may be paid in money to Receiver-General in England, or collector in Scotland; and calculated according to schedule (L).

By sect. 24, Bank shall transmit weekly accounts of the average price of the 3 *per cent.* consols, or 3 *per cent.* reduced, respectively, to the commissioners for taxes, who shall publish in the Gazette, and transmit to the Receivers-General, &c., an account of the price, to regulate the consideration for the redemption of land-tax, in money.

By sect. 25, the consideration of stock for redemption of land tax contracted for before or on June 24, 1803, shall be transferred within five years, from June 24, 1802, and after within two years from the contract, to the commissioners for reducing the national debt; by four instalments yearly, or the whole may be transferred at once, or by shorter instalments. Fractions less than 1*d.* to be avoided.

By sect. 26, where first instalment shall not have been transferable till after Feb. 1, 1801, on application to the commissioners for executing this act, within three months from June 24th, 1802, they may alter the contract, and agree that the remaining instalments may be transferred, within any period not exceeding five years †.

By sect. 27, consideration in money may be paid at once, or by instalments, not exceeding eight, payable in two years, according to the price of stock. (See sect. 24).

By sect. 28, the whole or part of such consideration may be paid in advance, on notice to Receiver-General, &c.,who shall transmit to the tax-office an account of such intended payments, which shall be made according to the price of stock ascertained in the week preceding.

† But see stat. 53 Geo. 3, c. 123, *post*, which enlarges the powers of the commissioners in regard to the mode of paying the consideration money for redemption. See forms at the end of this act.

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ing the said contract into effect, doubts have arisen whether

By sect. 29, on making the second and every subsequent instalment, interest shall be paid.

Parties claiming preference shall produce a description of the property to two commissioners of land-tax, &c. who shall settle and certify amount of land-tax, according to schedule (A). (*As to fee for certificate, see* § 163.)

Sect. 30. "That all and every bodies politic and corporate, or companies, or other persons claiming on their own behalf, or on the behalf of others, the benefit of preference hereby given, shall produce to any two commissioners of land-tax acting in and for the hundred, ward, lathe, wapentake, rape, or other division of the county, riding, city, borough, cinque port, town, or place in England, or, if in Scotland, to any two commissioners of supply of the county or stewartry, or chief magistrate of the city or borough, within which any manors, messuages, lands, tenements, or hereditaments, or other property, the land-tax whereof shall be proposed to be redeemed by virtue of this act, shall be situate, a schedule or description in writing of such manors, &c., or other property; which schedule shall contain the respective natures of the premises, and the name or names of the respective occupiers thereof, and the parish or place where the same shall be situate; and the said commissioners of land-tax or supply, or chief magistrate respectively, shall ascertain, settle, and adjust the amount of the land-tax charged upon the respective manors, &c., or other property, contained in such schedule, distinguishing, according to the form and method in the schedule to this act annexed, marked (A), the district or division, and also the parish or place, parishes, or places, within which, and the manors, &c., or other property, upon which each separate assessment of land-tax shall be charged; and shall grant a certificate thereof to the bodies politic or corporate, or companies, or other person or persons applying for the same, who shall thereupon produce such certificate to the respective commissioners acting in the execution of this act, for the same place, by virtue of his majesty's warrant under the royal sign manual, or transmit the same to their clerk; and if the land-tax proposed to be redeemed shall not exceed the sum of 25*l.*, and the consideration for the redemption thereof is to be in money, shall specify the same in writing, and whether the same is proposed to be paid in one sum or by instalments, and also the day or days on which the same is proposed to be paid; and the said last-mentioned commissioners are hereby authorized and required to examine such certificate, and amend the same if necessary, and thereupon to contract and agree with the bodies politic or corporate, or companies, or other persons applying for the redemption of such land-tax, according to the directions of this act; and the said last-mentioned commissioners shall cause the description of the manors, &c., or other property comprised in the certificate of land-tax, to be inserted in the certificate of the contract.

Such certificate shall be produced to and examined by commissioners for redemption, who may agree with the parties for the redemption of the land-tax.

Form and Effect of Contract for Redemption.

Form of certificates of contract: For Stock,

Sect. 31. "That, where the consideration for the redemption of any land-tax shall be in stock, the certificate of the contract shall be in the form

the land-tax has been effectually redeemed according to mentioned in the schedule to this act annexed marked (B); and where the consideration for such redemption shall be in lawful money of Great Britain, such certificate shall be in the form mentioned in the schedule to this act annexed marked (C).

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Sched. B—Money, *Sched.* C.

Sect. 32. "That where the said commissioners acting in the execution of this act as aforesaid, shall have in their possession copies of the respective assessments of land-tax, charged upon the respective parishes or places in their respective counties, ridings, divisions, stewartries, or places, which shall have been transmitted to them as true copies, by the clerks to the commissioners of land-tax, acting in and for any hundred, ward, lathe, wapentake, or other division in England, or by the clerks to the commissioners of supply in Scotland, of the county, stewartry, city, or burgh wherein such parishes or places shall be situate, according to the directions of the said secondly recited act of the thirty-ninth year of his present majesty's reign, it shall be lawful for the said commissioners acting in the execution of this act as aforesaid, to contract and agree with any bodies politic or corporate, or companies, or other person or persons, for the redemption of the land-tax charged upon their respective manors, &c. although no certificate of the amount of such land-tax shall be produced and shewn to them by the bodies politic or corporate, or companies, or other person or persons applying to redeem the same: Provided always, that such bodies politic or corporate, or companies, or other person or persons shall transmit to the clerk of the said commissioners acting in the execution of this act as aforesaid, such or the like schedule or description in writing, of all and every the said manors, &c., charged with such land-tax, as is hereby required to be produced to the said commissioners of land-tax or supply; and the said commissioners acting in the execution of this act, shall cause to be inserted in every certificate of such contract, the description of the manors, &c., or other property, contained in such schedule, and also a true copy of the assessment, so far as relates to such manors, &c., or other property, together with the amount of the land-tax charged thereon, according to such copy of the assessment as shall be in their possession as aforesaid.

Where commissioners for redemption have copies of assessments of land-tax transmitted under 39 Geo. 3, c. 21, they may contract with the parties, although they do not produce certificates of the amount; but the description of the estate, and also a copy of the assessment shall be transmitted to the commissioners, and inserted in the certificate of contract.

By sect. 33, clerks to land-tax commissioners, when required by the commissioners for redemption, or whenever any alteration shall be made in the assessment, shall transmit copies of such assessment or alteration, &c., on penalty of 50*l.*

By sect. 34, it is declared such copies shall be paid for.

Sect. 35. "That in case any difficulty shall arise in the redemption of land-tax, which ought to be charged on any tithes, or any fee-farm rents, feu-duties or other rents, or any lands, tenements, or hereditaments, because such tithes, &c. shall not have been assessed, or not distinctly assessed, to the land-tax, or because the land-tax has been deducted out of

Where tithes, fee-farm rents, &c., have not been, or not distinctly, assessed to the land-tax, commissioners

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the regulations prescribed by the acts of parliament relat-

of land-tax may adjust the proportions; and on their certificate the commissioners for redemption may contract.

any such rents by the owners or occupiers of the lands charged with such rents, it shall be lawful for the bodies politic or corporate, or companies, or other person or persons entitled to such tithes, &c., to apply to the commissioners of land-tax or supply, to settle and adjust the proportion of land-tax which ought to be borne and paid by such bodies politic, &c., or other person or persons on account of such tithes, &c., which shall not have been assessed, or not distinctly assessed, to the land-tax; and such commissioners of land-tax or supply, or any two of them, shall thereupon ascertain, settle, and adjust the same, and grant a certificate thereof; and, upon the production of such certificate, it shall be lawful for the commissioners acting in the execution of this act as aforesaid, to contract and agree with such bodies politic, &c., or other person or persons respectively, for the redemption of such land-tax; and it shall be lawful for all such bodies politic, &c., or other person or persons, to do all acts necessary for the purpose of carrying such contract into execution, in the same manner as if such tithes, &c., had been distinctly assessed to the land-tax.

When certificate, &c. shall be produced for entering into contract for redemption by a money consideration, the clerk to the commissioners for redemption shall transmit to the tax office and receiver general, &c., the amount of land-tax proposed to be redeemed, and the terms; whereupon treasury may direct money to be advanced to the commissioners for reducing the national debt, to be applied in purchasing stock to complete contracts, &c.

Sect. 37. "That whenever any such certificate or schedule as aforesaid shall be produced or transmitted by any bodies politic or corporate, or companies, or other person or persons, in pursuance of this act, for the purpose of entering into any contract for the redemption of land-tax, by payment of the consideration in money, the clerk to the commissioners acting in the execution of this act as aforesaid, shall forthwith cause an account to be transmitted to the commissioners for the affairs of taxes, for the information of the commissioners of his majesty's treasury, and also to the Receiver-General of the county, riding, or place, if in England, or to the Receiver-General if in Scotland, which shall specify the amount of the land-tax proposed to be redeemed, and the day or days of payment on which the whole consideration, or the different instalments thereof (as the case may be) shall be proposed to be paid; and the said commissioners of the treasury, or any three or more of them for the time being, are hereby empowered to direct from time to time, as there shall be occasion, sufficient money to be advanced to the commissioners for the reduction of the national debt, for the purchase of so much capital stock as shall be necessary for the completion of such contracts, or any instalment thereof, as well before or on the respective days appointed for the payment of the sums to be payable on such contract, as before or on the respective days whereon any payments in advance shall be made as hereinbefore is provided, or as soon after as the same can conveniently be done, out of any monies in the hands of such Receivers-General respectively, or out of any public monies in the receipt of the Exchequer, applicable to the supplies and services of the year, as to the said commissioners of the treasury shall seem expedient; which sums so advanced shall be from time to time replaced

ing thereto. And whereas in consequence of such doubts by and out of the monies to be paid upon such contract to such Receivers-General; and the stock so purchased shall be placed in the names of the commissioners for the reduction of the national debt, for the uses and purposes of this act, in like manner as if the same had been purchased by and with the monies paid on such contract; and as soon as any such contract shall be completed, the commissioners with whom the same shall have been entered into, shall also cause notice thereof to be transmitted to the said commissioners for the affairs of taxes, and also to such Receiver-General respectively, as aforesaid.

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Sect. 38. "That, upon the production of the certificate of any such contract as aforesaid at the Bank of England, in cases where the consideration shall be in stock, and upon the transfer to the commissioners for the reduction of the national debt, of the three pounds *per centum* Bank Annuities, to be transferred as the consideration for the redemption of the land-tax thereby contracted for, or of such proportion of such Bank Annuities as shall have been agreed to be transferred as the first instalment thereof, every such body politic or corporate, or company, or other person or persons, shall be entitled to have a certificate or receipt from the cashier or cashiers of the governor and company of the Bank of England, acknowledging such transfer, which certificate or receipt the said cashier or cashiers is or are hereby required to give; and the same shall be indorsed on the certificate of such contract in the form prescribed in the schedule to this act annexed, marked (E); and in cases where the consideration shall be in money, then, upon the production of the certificate of such contract to the Receiver-General for the county, riding, or place, in England, or his deputy, or the collector for the shire, stewartry, or place, in Scotland, where the manors, &c., or other property, of which the said land-tax shall be so redeemed, shall be situate, and upon payment to such Receiver-General, or his deputy, or such collector, of the sum of money to be paid as the consideration for such redemption, or of the proportion of any such sum as shall have been agreed to be paid as the first instalment thereof (which sum of money such Receiver-General, &c., is hereby authorized and required to receive accordingly) every such body politic, &c., shall be entitled to a certificat e or receipt from such Receiver-General, &c., acknowledging such payment, which shall be indorsed on the certificate of the contract, in the form prescribed in the schedule to this act annexed, marked (F); and every such certificate or receipt of the cashier or cashiers of the Bank of England, or of such Receiver-General, or his deputy, in England, or of such collector, in Scotland, shall be an acquittance and discharge to the bodies politic, &c., transferring such stock or paying such money as aforesaid; and upon the transfer or payment of such consideration, or of such proportion thereof as shall have been agreed to be transferred or paid

On production of certificate of contract, and transfer of the consideration where in stock the cashier of the Bank shall indorse a receipt on the certificate of contract. [*See sched.* (E)]

On money considerations, the Receiver-General, &c. on payment shall indorse the receipt on the certificate. [*See sched.* (F)]

On such transfer or payment,

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the completion of the said contract has been delayed, but

the lands shall be exonerated from land-tax from the preceding quarter day, provided the certificate of contract be duly registered, otherwise only from the quarter preceding the day of its being left for registry. (See § 164.)

as the first instalment thereof, the manors, &c. or other property comprised in such contract, shall be wholly freed and exonerated from the land-tax charged thereon, and from all further assessments thereof, from such of the quarterly days of payment of land-tax as shall next precede the day of the transfer or payment of such consideration, or the first instalment thereof, provided the certificate of the contract shall be duly registered pursuant to the directions of this act: Provided always, that where any contract for the redemption of any land-tax shall not be registered within the period hereinafter prescribed, the manors, &c., or other property therein comprised, shall only be exonerated from the land-tax charged thereon, from such of the said quarterly days of payment of land-tax as shall next precede the day whereon such contract shall be left at the proper office for the purpose of being registered; but all such manors, &c., or other property whereof the land-tax shall be so redeemed, shall be charged and chargeable with the payment of the land-tax, up to and upon such next preceding quarterly day of collection or payment of land-tax as aforesaid.

When one or more co-parceners shall redeem their land tax (see § 11), their allotments shall be exonerated immediately on partition.

Sect. 39. "That when any one or more of any persons who shall be seised or entitled in undivided shares and proportions, as co-parceners, or heirs portioners, tenants in common, or joint tenants, of or to any manors, messuages, lands, tenements, or hereditaments, shall redeem his, her or their proportion of the land-tax charged thereon, and partition shall at any time afterwards be made of the said manors, &c., between such co-parceners, &c., then and in such case the manors, &c. which shall upon such partition be allotted to the person or persons who shall so have redeemed his, her, or their proportion of the said land-tax, shall, immediately upon such partition being completed, be and become exonerated and discharged from such land-tax and every part thereof.

Where an option shall have been declared by a contractor for redemption, to be considered as a person not interested, by reason whereof the land tax shall remain chargeable, the commissioners for redemption may contract for exonerating the lands.

Sect. 40. "That in all cases where in any contract which shall have been entered into by virtue of the said recited acts for the redemption of land-tax, or any of them, an option shall have been declared to consider the bodies politic or corporate, or companies, or other person or persons contracting for such land-tax, on the same footing as a person not interested in the manors, messuages, lands, tenements, or hereditaments comprised in such contract, by reason whereof the said manors, &c., shall remain chargeable with the land-tax, and such bodies politic, &c., or their respective successors, heirs, executors, administrators, or assigns, shall be desirous of exonerating such manors, &c., from land-tax, it shall be lawful for them respectively, at any time hereafter, to make application for that purpose to the commissioners acting in the execution of this act as aforesaid, for the county, riding, shire, stewartry, city, town, or place, where such manors, &c. shall be situate; and on any such application, and on the production of a certificate under the hands and seals of any two of the com-

as the continuance of such delay would be inconvenient to

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missioners of land-tax acting for the division or place wherein the same shall be situate, of the amount of the land-tax then charged on such manors, &c., and of the certificate of the contract for the redemption of such land-tax, to the said commissioners acting in the execution of this act as aforesaid, it shall be lawful for them, or any two or more of them, to contract with such bodies politic, &c., their respective successors, heirs, executors, administrators, or assigns, for exonerating their said manors, &c., from land-tax; and in every such case, where it shall appear by such certificate and contract that no variation has taken place in the mean time, in the amount of such land-tax, to amend or cause to be amended the certificate of any such contract, by striking out all such parts thereof as relate to the declaration of such option therein, and to certify their having so done under their respective hands and seals, on the back of such certificate; and after the registry of such certificate and such indorsement thereon, in the manner herein directed (whether such certificate shall have been previously registered or not), the manors, &c., comprised therein, shall be wholly exonerated from land-tax, from such of the quarterly days of collection and payment of land-tax, as shall next precede the day whereon such certificate of contract shall be left at the proper office for the purpose of being registered as last mentioned; and whenever it shall appear in any such case, by the certificate of the amount of land-tax, and the certificate of the contract for redemption thereof, respectively, that the amount of land-tax then charged upon the manors, &c., comprised therein, is either more or less than the amount of land-tax redeemed by such contract, it shall be lawful for such commissioners, or any two of them, to rescind such contract, and to enter into a new contract for the redemption of the land-tax, which shall be then charged upon the said manors, &c., without any declaration of an option being inserted therein, and to indorse on the certificate of such new contract a true copy of any receipt or receipts indorsed on the original certificate of the contract, purporting to be given by any cashier or cashiers of the Bank of England, or by any receiver or Receivers-General of land-tax in England, or collector in Scotland, for the consideration, or any part thereof, to be transferred or paid, and actually transferred or paid, on such original contract: Provided that no such manors, &c., shall be exonerated in any case where any such land tax shall have been increased, unless the bodies politic, &c., so applying as aforesaid, shall contract to transfer or pay, and shall, at the time to be mentioned in such certificate of contract, accordingly transfer at the Bank of England, or pay to the Receiver-General in England, or his deputy, or collector in Scotland, of the county, riding, shire, stewartry, city, borough, town, or place, where the same shall be situate (as the case may require) so much three pounds *per cen-*

How such contracts shall be completed where no variation has taken place in amount of land-tax.

How, on increase or decrease of land-tax.

Where land-tax has increased, the party shall contract to transfer additional stock, &c.

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both the said [*obligor*] and [*obligee*], it has been stipu-

tum Bank Annuities, in addition to the amount of stock that shall have been already transferred, or so much money in addition to the amount of money already paid in respect of such land-tax, as shall be necessary, according to the provisions of this act, to redeem so much land-tax as shall be equal in amount to the difference between the land-tax contracted for in and by such new contract, and the land-tax contracted for in and by the contract which shall have been so rescinded: Provided also, that in every such case where the land-tax contracted for as aforesaid, shall have been in the mean time decreased in amount, which amount shall have been duly charged on any other manors, &c., in the same parish or place, and a new contract shall be entered into for the redemption of the land-tax then charged as aforesaid in pursuance of this act, the commissioners who shall enter into such last-mentioned contract shall certify in writing, signed by two or more of them, to the commissioners for the affairs of taxes, the several amounts of the stock or money contracted to be transferred or paid by, and actually transferred or paid, in pursuance of the original and new contracts respectively; and it shall thereupon be lawful for the said commissioners for the affairs of taxes, to order and direct the Governor and Company of the Bank of England, or the Receiver-Geneneral in England, or collector in Scotland, for the county, riding, shire, stewartry, city, or place, where such manors, &c., shall be situate respectively, in cases where more or a greater consideration shall have been transferred or paid on the original contract than the consideration inserted in the new certificate of contract, to repay all such monies to the bodies politic, &c., who shall be entitled to the same, as shall be due and payable in respect of such difference in the considerations, if such monies shall not have been vested in stock; and in cases where such stock hath been purchased and placed in the name of or transferred to the commissioners for the reduction of the national debt, then upon a certificate, signed by any three or more of the said commissioners for the affairs of taxes, of the amount of such stock transferred upon the original contract, and the amount required to be transferred upon the new contract, it shall be lawful for the said commissioners for the reduction of the national debt, or any one or more of them, and he and they is and are hereby required, to transfer the difference between such amounts of stock so certified, to the bodies politic, &c., entitled unto the same; and after the registry of such certificate of contract in the manner herein directed, the manors, &c., comprised therein, shall be wholly exonerated from land-tax, from such of the quarterly days appointed for the payment of land-tax, as shall next precede the day whereon such certificate of contract shall be left at the proper office, for the purpose of being registered as aforesaid.

Where decreased, the commissioners shall certify the amount of the consideration to the tax office, who shall order the difference to be settled.

Time of exoneration.

lated and agreed between them, that the said contract

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Powers of raising and applying Money for the Redemption of the Land Tax.

How trust property may be applied in redemption of land-tax on limited lands.

Sect. 42. "That where any manors, &c., belonging to any other person or persons, shall be settled or limited to or for any particular uses, trusts, intents, or purposes, and any other property, shall be subject to any trust to be laid out or invested in the purchase of other manors, &c., to be settled to or for the same uses, trusts, intents, or purposes, or to be applied in the payment of any debts or charges affecting the same, then, and in every such case, it shall be lawful to apply such other property in the redemption of the land-tax, or any part thereof, charged upon such settled manors, &c., with such consent as shall be necessary for the purpose of applying such other property in the purchase of any manors, &c., according to the terms of the trust affecting the same, whether such trust shall have been created or directed by any act of Parliament, deed, will, or otherwise; and when any such trust property shall be under the direction or control of any Court, the same shall be so applied under the order of such Court.

Land-tax so redeemed with trust property shall merge in the lands.

Sect. 43. "That where any land-tax charged upon any manors, &c., belonging to any such bodies politic or corporate, or companies, or feoffees or trustees for charitable or other public purposes, or other person or persons, shall be redeemed by the application of any such personal trust property as aforesaid, in pursuance of this act, such land-tax shall sink and become merged in the same manors, &c., for the benefit of the bodies politic or corporate, or companies, or feoffees, or trustees for charitable or other public purposes, or other person or persons respectively entitled thereto: Provided also, that in case any such personal trust property which shall be so applied, shall be insufficient for the redemption of the whole land-tax charged upon such manors, &c., it shall be lawful for such bodies politic or corporate, or companies, or feoffees, or trustees for charitable or other public purposes, or other person or persons, respectively, to use and exercise all and every other the powers given to or vested in them respectively in and by this act, in order to raise money for the redemption of so much of the land-tax charged on such manors, &c., as such personal trust property shall be insufficient to redeem.

Where trust property is insufficient, deficiency may be supplied under this act.

By sect. 44, governors of queen Anne's bounty may apply money in redeeming land-tax on livings, and purchasing rent charges granted by incumbents, under former acts. (See also sect. 15, 161).

By sect. 45, trustees for poor clergy may lay out trust money in redeeming land-tax on livings. (And see sect. 16, 77, 161).

By sect. 46, land-tax on lands settled for the benefit of any parish, &c., may be redeemed out of the poor or church rates, with approbation of two justices.

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shall be forthwith completed, upon the said [*obligor*] en-

By sect. 47, such land-tax may be redeemed by trust property, and the lands shall be charged with an annuity equal to the trust property so applied, with the like consent of justices.

By sect. 48, donations to hospitals, &c. may be applied in redemption of land-tax.

By sect. 49, canal companies, &c. (see sect. 12), may redeem by calls, &c., under the respective acts.

By sect. 50, money may be bequeathed, &c. to redeem land-tax for charitable uses.

For redeeming land tax on lands belonging to individuals, the persons in possession, but not having the absolute estate, &c. and persons beneficially entitled to rents, (except tenants at rack rent, &c. and crown tenants, [see sect. 71]) may sell part of such lands, heriots, &c. or may mortgage the same, or grant any rent-charge to the amount of the land tax. (*As to corporations see post*, sect. 69, &c.)

Sect. 51. "That, for the purpose of redeeming any land-tax charged on any manors, &c., belonging to any person or persons (not being respectively bodies politic or corporate, or companies, or feoffees, or trustees for charitable or other public purposes), whether such manors, &c., shall be respectively situate in the same or in any other division or place in the same county, riding, shire, or stewartry, or in any other county, riding, shire, or stewartry, and whether such land-tax shall have been or shall be contracted for either before or on the said 24th day of June, 1802, by virtue of the said recited acts, or any of them, or at any time thereafter, by virtue of this act, it shall be lawful for all and every such person and persons, who are, is, or shall for the time being be seised or possessed, or entitled beneficially in possession to the rents and profits of, but who shall not have the absolute estate or interest in, any manors, &c., or any heriots, services, emoluments, or advantages, issuing or payable from or in respect of any freehold or copyhold or customary messuages, &c., or incident thereto, or accruing therefrom (other than and except tenants at rack rent for any terms of years, or from year to year, or at will, and tenants holding under the crown any lands or tenements within the survey and receipt of the Exechequer or the Duchy of Lancaster, or under the Duke of Cornwall, any lands or tenements belonging to and parcel of the Duchy of Cornwall), but nevertheless under the restrictions and regulations hereinafter mentioned, absolutely to sell and dispose of, by public sale or private contract, and, by deed indented and enrolled or registered in the manner prescribed by this act, to convey (either at one time for the purpose of making good the whole of the consideration for the redemption of any such land-tax, or at various times for the purpose of making good the respective instalments thereof, as the same shall respectively become due, or any number of instalments at once, as shall be most expedient) any such manors, &c., or any such heriots, services, emoluments, or advantages, whereof such person or persons shall be in the actual possession, or entitled beneficially to the rents and profits, as shall be eligible and necessary, whether of freehold or of copyhold, or customary tenure, or holden for any term or terms of years (other than for any term or terms of years at a rack rent) and whether the manors, &c., heriots, services, emoluments, or ad-

tering into the above-written bond with the condition hereinafter contained.

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vantages, so sold shall be charged or not charged with, or shall be exempt from the payment of land-tax; and if the same shall be charged with any land-tax, then freed and discharged from such land-tax; and it shall also be lawful for all and every such persons and person who are or is, or shall for the time being be in the actual receipt or perception of, and beneficially entitled to, the rents and services reserved or due and payable in respect and out of any manors, &c., which shall have been or shall be granted by him, her, or them, or any former owner or owners thereof, for any beneficial lease or leases, or by any copy or copies of court roll, or demised according to the custom of any manor for life or lives, or years absolute, or years determinable on any life or lives, absolutely to sell and dispose of, by public sale or private contract, and in like manner to convey (either at one time or at various times as aforesaid) the fee simple and inheritance of any such manors, &c., which shall have been or shall be so granted or demised for any beneficial lease or leases, or by any copy or copies of court roll, or by any other grant, according to the custom of any manor, for life or lives, or years absolute, or years determinable upon any life or lives, and also the rents and services, and other profits reserved or payable upon or in respect of such leasehold or copyhold tenements or hereditaments, subject to the subsisting interests of the respective lessees, copyholders, or other customary tenants, whether such last-mentioned manors, &c., shall be charged or not charged with, or shall be exempt from the payment of land-tax, or whether the land-tax charged thereon shall have been redeemed by the respective lessees, or copyholders, or customary tenants thereof, or not, and if the same shall be charged with any tax, then freed and discharged from such land-tax; and it shall be lawful for all and every such persons and person, by deed indented, and also enrolled or registered as herein is directed, and under the restrictions and regulations hereinafter mentioned, to convey or demise any of such freehold, copyhold, or leasehold manors, &c., whereof they shall be in the actual possession or beneficially entitled to the rents and profits, as aforesaid, freed and discharged from land-tax, in case any land-tax shall be charged thereon, to any person or persons by way of mortgage, either in fee simple, or for any term or terms of years (where the same shall not be of copyhold or customary tenure), for securing such sum or sums of money as shall be sufficient to redeem the land-tax which hath been or shall be so contracted for by such person or persons as aforesaid, or to grant any rent-charge to be issuing out of and chargeable upon any such manors, &c., as aforesaid, not exceeding the amount of the land-tax so contracted for as aforesaid: Provided always, that no sale, mortgage, or grant of or out of any manors, &c., shall be made by any such person or persons by virtue of this act, other than for the purpose of redeeming land-

No such sale, &c. shall be made, but for redeeming land-

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NOW THE CONDITION of the above-written bond or obligation is such, that if the said [*obligor*], his heirs,

tax on lands sold, &c.

tax charged thereon (in cases where the same shall be charged with any land-tax), and also on other manors, &c., which stand limited or settled, and subject to or for the same uses, trusts, intents, or purposes, or in the same order or course of limitation as the manors, &c., which shall be so sold, mortgaged, or charged as aforesaid, save and except as to such variations as may necessarily be occasioned by the difference in the nature of the tenure of freehold and copyhold estates.

Tenants in tail in England may convey by deed enrolled.

Sect. 52. "That it shall be lawful for any person who shall be seised in fee tail of any manors, messuages, lands, tenements, or hereditaments, in England, to convey such part or parts thereof as shall be deemed eligible and necessary to be sold for the purpose of redeeming the land-tax charged on such manors, &c., by deed indented and enrolled or registered in the manner prescribed by this act; and every such deed so enrolled or registered as aforesaid, shall as effectually and absolutely bar all estates tail and other estates in possession, reversion, remainder, or expectancy, in the hereditaments so conveyed, as if such tenant in tail had levied a fine or suffered a common recovery thereof in due form of law.

Committees, guardians, &c. may sell, &c. lands belonging to incapacitated persons. (And see sect. 14).

Sect. 53. "That, for the purposes aforesaid, it shall be lawful for all committees and curators of lunatics or idiots, and guardians or tutors of infants, and all executors and administrators, curators, or trustees whatsoever, seised or possessed of any manors, messuages, lands, tenements, or hereditaments, in trust, and having authority to act for infants, minors, issue unborn, femes-covert, or other persons incapable, by law or deed, to act for themselves, on the behalf of such incapacitated persons respectively, and under the restrictions and regulations herein contained, to sell, or mortgage and convey, or grant, any rent-charge out of any manors, &c., belonging to, or limited or settled to the use or for the benefit of, any such lunatics or idiots, infants, minors, issue unborn, femes-covert, or other incapacitated persons, which such lunatics or idiots, infants, or minors, issue unborn (if *in esse*), femes-covert, or other incapacitated persons, could or might have sold, mortgaged, or charged with any rent-charge for the purpose of redeeming any land-tax in respect of their estate or interest therein, either by virtue of this act or otherwise, if they respectively had not been under any such incapacity as aforesaid, and in the same manner in all respects as they respectively could or might have sold, or mortgaged and conveyed, or charged the same.

Such sales, &c. of estates in England, shall be made under the authority of two commissioners for the place

Sect. 54. "That all sales, mortgages, or grants, in relation to estates in England, which shall be made by virtue of this act, by any person or persons (other than bodies politic or corporate, or companies, or feoffees or trustees for charitable or other public purposes, and other than such person or persons holding under any grant from the crown, or any act of

executors, or administrators, do and shall within six calen-

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Parliament, as hereinafter mentioned), shall be made under the authority, and with the consent and approbation of the commissioners for the time being acting in the execution of this act, by virtue of his majesty's warrant under the royal sign manual, for the county, riding, or place, in which the manors, messuages, lands, tenements, or hereditaments, which shall be so sold, mortgaged, or charged, shall be situate; and no such sale, mortgage, or grant shall be valid or effectual, unless two at least of such commissioners shall certify their consent thereto, and approbation thereof, by signing and sealing the deed of sale, mortgage, or grant, as parties thereto.

where the lands lie.

Sect. 55. "That no manors, messuages, lands, tenements, or hereditaments in England, shall be so sold or mortgaged, nor any rent-charge granted thereout by virtue of this act, by any person or persons, under the authority of the said last-mentioned commissioners, without one calendar month's previous notice in writing, given to the said commissioners, by the person or persons desirous of making such sale, mortgage, or grant; nor unless such person or persons shall, previously to such sale, &c., produce to the said commissioners a schedule in writing, declaring the quantity or duration of his, her, or their estate or interest in the manors, &c., whereon the land-tax proposed to be redeemed shall be charged, and (if the same shall not be an estate of inheritance) then the name or names of the bodies politic or corporate, or companies, or other person or persons next entitled to any beneficial interest in such manors, &c., expectant on the determination of the immediate estate or interest therein; and if such manors, &c., shall be subject to any mortgage, charge, lien, or incumbrance, then the name or names of the bodies politic or corporate, or companies, or other person or persons having such mortgage, &c., and the amount thereof, and (if more than one) the priorities of the respective incumbrances.

One month's previous notice of such sale, &c. shall be given to the commissioners; with a schedule of certain particulars.

By sect. 56, where lands are sold at various times, situate in different counties, certificates of former sales shall be granted and produced; and parties may be examined on oath by commissioners.

Sect. 57. "That nothing herein contained shall be construed to extend to enable any tenant for lives, or for years determinable on lives, or for years absolute, though not at rack rent, to sell any part of the tenement demised, in case of a demise, for which any fine or premium was paid, without the consent of the bodies politic or corporate, or companies, or other person or persons entitled to the immediate estate in reversion upon such demise.

Tenants for lives, &c. on fine, may not sell without consent of reversioners.

By sect. 58, where trusts or incumbrances equally affect the whole of lands, part whereof shall be proposed to be sold, the Court of Chancery, being satisfied that the unsold part is sufficient for the objects of such trusts, &c., may order such part to be conveyed to the purchaser discharged from such trusts and incumbrances.

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dar months, from the date of the above-written bond, at

By sect. 59, when such sale shall be by auction, ten days' previous notice shall be given; when by private contract, an estimate in writing, upon oath, of the value shall be made.

How owners of manors in England, may enfranchise copyholds. (See as to corporations, sect. 70).

Sect. 60. "That it shall be lawful for any person or persons (not being respectively bodies politic or corporate, or companies, or feoffees, or trustees for charitable or other public purposes, and not holding under any grant from the crown, or any act of Parliament, as hereinafter is mentioned) who are or shall be seised of or beneficially entitled to any manors in England, of which any copyhold or customary estates shall be holden, with the approbation of the Court of Chancery, to be signified by order, upon a petition to be preferred in a summary way, to enfranchise any such copyhold or customary estates.

By sect. 67, timber may be cut down and sold for redemption of land-tax, by consent of Court of Chancery, obtained upon petition, and the tax shall merge in the lands, unless otherwise ordered. (See sect. 98—102).

By sect. 68, where the consideration for any sale, mortgage, or grant, by individuals, shall not exceed 1000*l.* the deed, &c., shall not be liable to stamp duty. Former deeds, &c., valid, though not stamped. (And see ss. 81, 107, 173).

By sect. 69, corporations and trustees for charitable and public purposes are empowered to sell, mortgage, and grant rent-charges; but no such sale, &c., shall be made, but for redeeming the land-tax. (But see *post*, pp. 435, 436, 437).

By sect. 70, corporations, &c., empowered to enfranchise copyholds, &c. (See as to individuals, sect. 60).

By sect. 71, possessors of lands granted under the Crown, or any act of Parliament, wherein his majesty hath any estate (except tenants for life, &c.) may sell or enfranchise lands for redeeming the land-tax.

By sect. 72, his Majesty may appoint members of the privy council to be commissioners for regulating sales by corporations, &c., or tenants of the crown, &c. Two commissioners may act. (See sect. 1).

By sect. 76, sales, &c., by corporations, &c., shall be made under direction of such commissioners, two of whom shall be made parties.

By sect. 77, governors of charity for clergymen's widows, &c., empowered to sell lands, with consent of such commissioners.

By sect. 78, colleges, &c., may redeem land-tax on livings belonging to them, by sale, &c., of any of their lands; and shall be entitled to an equivalent rent-charge out of the living, unless they declare otherwise at the time of presentation, &c. [*Vide* 50 Geo. 3, c. 58].

By sect. 79, ecclesiastical rectors may redeem land-tax on vicarages, &c., by sale of part of the rectorial glebe: and the incumbent of the rectory shall be entitled to an equivalent rent-charge out of the vicarage.

his or their own costs, procure and deliver to the said

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By sect. 81, all deeds, &c., on such sales exempted from stamp-duty. (See sections 68, 107, 173).

By sect. 82, where lands of corporations, &c., shall be sold, which are subject to any charge, such commissioners shall direct how the same shall be paid in future.

So by sect. 83, where part of lands usually demised together by corporations, and trustees for public purposes, are liable to an ancient rent.

By sect. 84, commissioners shall adjust all questions between corporations and trustees for public purposes, and their lessees, as to enfranchisement of lands.

By sect. 85, where the reversion of lands holden under corporations, &c., by lease for lives, &c., shall be purchased by the persons beneficially entitled to the profits, but not having the absolute interest, who shall be bound to renew at their own charge the interests under the lease, and the reversion shall, under the directions of the said commissioners, be chargeable with the money advanced and interest, and settled as herein directed; and where the immediate estates are charged with such payment, the persons entitled to the rents shall be chargeable with interest. (See also sect. 115). Commissioners may apply to Chancery.

By sect. 86, corporations, &c., may purchase of their lessees, &c., land-tax redeemed by them, and may sell lands for that purpose, as in the first instance; or if money, &c., shall be in the Bank, &c., from sales previously made, it may be applied in such purchase. [And see 53 Geo. 3, c. 123, sect. 24].

By sect. 87, where money from sale of lands belonging to corporations, &c. shall be insufficient to redeem the whole land-tax, Bank may receive the deficiency from them.

Consequences of Redemption in certain cases, and miscellaneous Regulations.

Land-tax redeemed by bishops or other ecclesiastical corporations, shall be considered as an additional yearly rent on all demises:

Sect. 88. "That where the land-tax charged on any manors, &c., belonging to any bishop or other ecclesiastical corporation, shall have been or shall be redeemed by such bishop or ecclesiastical corporation, with any monies which shall have been or shall be raised for that purpose, by virtue of any of the powers or provisions of the said recited acts or of this act, such land-tax shall be considered as yearly rent, payable to such bishop, or other ecclesiastical corporation, his and their successors, over and above the reserved rent (if any), during the demise existing at the time of such sale and shall be recovered and paid as such; and the land-tax so redeemed shall, in all future demises of such manors, &c., be added to the ancient and accustomed yearly rent reserved or made payable during the terms granted by such demises, and shall be reserved and made payable as such accustomed yearly rent during the terms to be granted as aforesaid, and

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[*obligee*], his heirs or assigns, to the satisfaction of his or

shall be recovered and recoverable as such accustomed rent, by the like remedies as such bishops, or other ecclesiastical corporations, may use for the recovery of the ancient and accustomed rent reserved upon such demises; and where such manors, &c. shall be demised to any under-lessee, who shall be bound by any covenant or agreement to pay the land-tax charged thereon, then and in such case the amount of such land-tax shall be considered as rent reserved or made payable on such last-mentioned demise; and the same powers shall be had, used, or enjoyed, for the recovery thereof, as for the recovery of such rent when in arrear†.

as shall also land-tax redeemed by corporations, &c. on copyhold lands let on lease. (See sect. 118, as to leaseholds, &c.)

Sect. 89. "That where any land-tax chargeable on any manors, messuages, lands, tenements, or hereditaments, which are or shall be holden by copy of court roll or other customary tenure, of any manor or manors belonging to any body politic or corporate, or company, or any feoffees, or trustees for charitable or other public purposes, as aforesaid, by virtue of any lease or leases, shall have been or shall be redeemed by any such body politic, &c., under the powers contained in any of the said recited acts, or this act, the amount of the land-tax so redeemed or purchased, shall be considered as rent reserved to such body politic, &c., as aforesaid, out of such copyhold or customary manors, &c., and be payable on the same days as such land-tax was payable before the redemption thereof; and the same powers shall be had, used, and enjoyed for the recovery thereof, as for the recovery of rent in arrear.

By sect. 90, in all cases the whole of lands usually occupied together may be sold, where they cannot be divided without loss. (As to disposal of the surplus, see sect. 100).

By sect. 91, where individuals or corporations have redeemed land-tax by advance of money, &c., or contracted for assignment, &c., they may raise money as they might have done in the first instance. (See also sect. 166).

Where any allowance shall be made out of any fee-farm or other rents in respect of the land-tax, they may be sold, subject to such allowance.

Sect. 92. "That where any deduction or allowance shall have been or shall be made or allowed out of any fee-farm or other rents or annuities issuing or payable out of any manors, messuages, lands, tenements, or hereditaments, to or for the benefit of any bodies politic or corporate, or companies, or feoffees, or trustees for charitable or other public purposes, or other person or persons, in respect of the land-tax charged, or which shall have been charged on such manors, &c., it shall be lawful for such bodies politic, &c., to sell such fee-farm or other rents or annuities, for the purposes, and according to the provisions, and under the restrictions of this act subject to such deduction or allowance, and whether the land-tax charged on the manors, &c., out of which the same shall be issuing or payable, shall have been or shall be redeemed at the time of such sale or not,

† *Vide* precedent of such a lease, *post*, Vol. 5, p. 129.

their counsel, good, valid, and sufficient evidence of the

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and although the purchase monies for the same shall, in the judgment of the respective commissioners authorizing and approving of or consenting to such sale, be sufficient to redeem so much land-tax only, as shall be equal to the amount of the clear fee-farm or other rent or annuity, after making such deduction or allowance as aforesaid; and every such fee-farm or other rent or annuity shall thenceforth be freed and exonerated from land-tax, and all future assessments thereof, and also from all deductions or allowances thereout in respect of land-tax, other than and except such deduction or allowance as shall have been made or allowed at the time of such sale.

Notice of the intention to sell the fee-simple of lands in lease, or copyhold lands, shall be given to the person beneficially interested, who shall have a certain privilege of pre-emption, as shall one co-parcener, on the refusal of the others; if the price offered be not accepted, the lands shall not be sold at a reduced price till after further notice. The privilege of pre-emption may be waived.

Sect. 93. "That where the fee simple and inheritance of any manors, messuages, lands, tenements, or hereditaments, holden under any beneficial lease or leases, or by copy of court roll, as hereinbefore is mentioned, shall be proposed to be sold by virtue of this act, two calendar months' notice of such intended sale shall be given by the body politic or corporate, or company, or other person or persons proposing to sell the same, to the person or persons, for the time being beneficially interested therein, under the subsisting lease or leases, or copy or copies of court roll thereof, or to his, her, or their committee or committees in cases of lunacy, or guardian or guardians in cases of infancy, or, in any other cases of incapacity, to the trustee or trustees, or other person or persons having authority to act for such person or persons incapable of acting for themselves; during which period of two months the person and persons so beneficially interested, or his, her, or their committee or committees, guardian or guardians, trustee or trustees, or other person or persons having authority to act for him, her, or them, on his, her, or their behalf, shall be entitled to contract for the purchase thereof, in preference to any other person or persons; and any one co-parcener, or joint tenant, or tenant in common, beneficially interested as aforesaid, shall have the like privilege of pre-emption, in respect of the whole of the estate comprised in any such lease or grant, by copy of court roll, on the refusal of any other co-parcener, joint tenant, or tenant in common, to contract for the purchase of their respective shares; and such manors, &c., shall not be sold to any other person or persons till after the expiration of such notice, unless the person or persons having the privilege of pre-emption on behalf of themselves or others, shall, by writing under his, her, or their hand or hands, waive the same, in which case such fee simple and inheritance may be sold to any other person or persons at any time before the expiration of such notice: Provided always, that when any price shall have been offered for the purchase of any such manors, &c., by any person or persons having such privilege of pre-emption as aforesaid, which shall not be accepted by the body politic, &c., proposing to sell the same, such manors, &c., shall not, at any time afterwards, be sold

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said farm and lands being discharged from the land-tax, to any other person or persons for a less price than the price so offered by the person or persons having such privilege of pre-emption as aforesaid, till after the expiration of two calendar months' further notice given to such last-mentioned person or persons, of the sale proposed to be made at such reduced price (and which further notice is hereby required to be given in every such case), during which further period such person or persons shall have the like privilege of pre-emption as aforesaid, of such manors, &c., at such reduced price; Provided also, that, if such person or persons shall waive such privilege of pre-emption in manner aforesaid, such manors, &c., may be sold to any other person or persons at such reduced price, at any time before the expiration of such period: Provided also, that every such notice to any committee of any lunatic, or any guardian of any infant, or any other person having authority to act for any incapacitated person, shall be as valid and effectual to enable the sale of such manors, &c., to any person or persons not having any interest in the subsisting lease or grant thereof, after the expiration of such notice (or sooner in case of the waiver of the privilege of pre-emption by any such committee, guardian, or other person or persons having authority to act as aforesaid), as if such notice or waiver had been given or made to or by any person or persons of capacity by law to act for themselves.

By sect. 94, sale or mortgage of copyhold lands, &c., shall not affect the right of lords of manors to fines, &c.

By sect. 95, no more of an estate (except under sect. 90), shall be sold, nor more money raised, than commissioners shall think necessary for redeeming land-tax and paying expences †.

By sect. 96, no lands shall be sold, or charged, if the person next beneficially entitled shall, within a month after notice of intended sale, &c., agree to redeem the land-tax; which he may then do as a person in remainder. (See sections 123, 125). Notice not requisite in certain cases.

By sect. 97, on proposed sales or mortgage reversioners aggrieved may, at any time before conveyance, apply by petition to Chancery, which Court may order sales or mortgage to be suspended.

Money arising from sale, &c., shall be paid (except otherwise directed. See ss. 95, 91, 104), into the bank to the account of the commissioners

Sect. 98. " That all and every sum and sums of money to arise by virtue of any sale, mortgage, or grant, to be made in pursuance of this act (except such part thereof, if any, which shall have been reserved under the order and direction of the respective commissioners authorizing the sale, mortgage, or grant, for the purpose of paying costs and expenses incurred therein, and except in cases where the payment thereof is otherwise authorized or directed by this act), shall be paid by the respective purchasers

† But the stat. 54 Geo. 3, c. 173, sect. 12, gives validity to sales, where more has been sold inadvertently. See also 57 Geo. 3, c. 100, s. 26.

pursuant to the act of Parliament in that case made and

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mortgagees, or grantees, into the bank of England; and thereupon the Governor and Company of the bank of England are hereby required to place the same to the account of the commissioners for the reduction of the national debt, under the title of *An Account of the Sale of the Land-Tax*, who shall keep distinct accounts thereof, and cause the same to be forthwith invested in the purchase of 3*l*. *per centum* bank annuities, in their names, according to the directions of this act, whether the contract or contracts for the redemption of the land-tax to be redeemed therewith, or the deed of sale, mortgage, or grant, shall have been completed or not; and the cashiers of the bank are hereby required from time to time to receive all such monies when tendered at the bank; and the receipt of such cashiers, or any one of them, shall be a full and sufficient discharge to the several purchasers, mortgagees, or grantees paying in such monies as aforesaid; and the bodies politic or corporate, or companies, or other person or persons whose land-tax shall have been or shall be redeemed therewith, shall, upon the production of the certificate of the contract or contracts for the redemption of such land-tax, be entitled to have and receive the same certificates and discharges, and their, his, or her estate shall be exonerated and discharged from such land-tax, in the same manner in all respects as if the quantity of 3*l*. *per centum* bank annuities to be purchased with such monies, had been actually transferred by them, him, or her, to the said commissioners, as the consideration for the redemption of such land-tax.

for the national debt, and invested in 3 *per cents*., and on the cashier's receipt the land-tax shall be redeemed, &c., as if stock had been transferred by the parties. (See sect. 117.)

By sect. 99, corporations, trustees for charity, and other persons selling lands for the purposes of the act, may agree with the purchasers, that the consideration shall be in the 3*l*. *per cents*. instead of money; and the certificate of the cashiers at the bank, to purchasers transferring stock, shall discharge such purchaser.

By sect. 100, surplus of stock (if any) after sufficient has been transferred to redeem the land-tax, shall be invested in the bank in the name of the Accountant-General, and applied by order of Chancery, upon petition, in the discharge of incumbrances, or in the purchase of other lands; and the income to be applicable for the benefit of parties entitled to the lands †.

By sect. 102, surplus not exceeding 200*l*. stock, shall be transferred to a trustee, without application to the Court.

By sect. 103, where lands are sold or are charged for not more than 500*l*., and the consideration for redemption is in money, it may be paid to the Receiver-General, &c., and the surplus to a trustee.

Sect. 114. "That all and every bodies politic and corporate, or companies, or other person or persons having any mortgage, charge, lien, or incumbrance on any manors, messuages, lands, tenements, or heredita-

Prior mortgagees shall not be affected by mortgages under this

† But see 53 Geo. 3, c. 123, sect. 79.

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provided; *Then* the above-written bond or obligation shall

act, except as to interest; and shall have preference to redeem the land-tax.

ments, which shall be mortgaged, or out of which any rent-charge shall have been or shall be granted by virtue of the said recited acts or of this act, shall have and be entitled to all such remedies, privileges, and advantages, both at law and in equity, as he, she, or they would have had or been entitled to, in case the said acts or this act had not been passed, or no mortgage or grant had been made by virtue thereof respectively; and the person or persons who shall have lent, or who shall lend, any money for the purposes of the said recited acts or of this act, shall not have priority of security on the said manors, &c., by force and virtue of the said acts or of this act respectively, over any such prior mortgage, &c., in respect of the principal money lent for the purposes of this act, but in respect of the interest thereof only: Provided also, that all bodies politic or corporate, or companies, or other person or persons having any prior mortgages, &c., on such manors, &c., shall be entitled, according to their respective priorities, to advance the money required for the redemption of such land-tax, in preference to all other persons.

No reversioner liable to payment of more than one year's arrear of interest, &c.

Sect. 115. "That no bodies politic or corporate, or companies, or other person or persons entitled in remainder, reversion, or expectancy to, or having any future interest in, any manors, messuages, lands, tenements, or hereditaments, which shall be so conveyed or demised by way of mortgage, or whereout any such rent-charge or rent-charges as aforesaid shall have been or shall be granted and made payable in pursuance of the said recited acts, or of this act, shall be liable upon their, his, or her coming into the possession of, or being beneficially entitled to, any such manors, &c., to the payment of arrears of interest on any sum or sums of money secured by mortgage as aforesaid, or of arrears of any rent-charge for more than twelve calendar months preceding the time that the title to such possession shall have accrued.

Grantees of rent-charges may recover same as rents.

Sect. 116. "That the respective persons to whom any rent-charges shall have been or shall be granted by virtue of the said recited acts or of this act, shall have and be entitled to use and take the same powers, remedies, benefits, and advantages for the recovery thereof, as landlords by the law have or are entitled to use and take for the recovery of rents reserved on common demises or leases.

When money is not paid into the bank, but invested in the 3*l. per cents.*, commissioners for the national debt shall accept the transfer thereof, and grant a certificate, on produc-

Sect. 117. "That where any money arising from the sale of any manors, messuages, lands, tenements, or hereditaments, shall not have been or shall not be paid into the bank of England pursuant to the directions of the said recited acts or of this act, but shall have been, or shall be laid out and invested in the purchase of 3*l. per centum* bank annuities transferred, or for the purpose of being transferred, to the commissioners for the reduction of the national debt, as the consideration for the redemption of any land-tax chargeable on any manors, &c., belonging to any bodies politic or corpo-

be void; but otherwise shall be and remain in full force and virtue.

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rate, or companies or other person or persons by whom such first-mentioned manors, &c., shall have been or shall be hereafter sold, then, and in such case, the commissioners for the reduction of the national debt, or any one or more of them, shall and they are thereby authorized and required to accept and receive the transfer of such 3*l. per centum* bank annuities, and to grant to any purchaser or purchasers of such manors, &c., his, her, or their agent or agents, a certificate under his or their hand or hands, of the amount of 3*l. per centum* bank annuities which shall have been or shall be so transferred to them as aforesaid; and, upon the production of such certificate to any of the cashiers of the bank of England, he or they shall and is or are hereby required to give any such purchaser or purchasers such receipt or receipts as by the said acts, or any of them, or this act, is or are required to be given, as well for any monies which shall have been or shall be so invested as aforesaid, as for any other monies which may have been or may be paid by him, her, or them, into the bank of England, in the manner required by the said recited acts, or any of them, or by this act.

tion of which at the bank, a receipt shall be given. (See sect. 98).

Sect. 118. "That in all cases where the land-tax charged upon any manors, messuages, lands, tenements, or hereditaments, belonging to any bodies politic or corporate (other than bishops or other ecclesiastical corporations), or to any companies, or other person or persons, and granted out upon any beneficial lease or leases, or by any copy or copies of court roll or other grant, according to the custom of any manor, for life or lives, or years absolute, or years determinable upon any life or lives, shall be redeemed by the monies arising from the sale or sales of the fee simple and inheritance of any part of such manors, &c., then, and in such case, the respective manors, &c., remaining unsold, shall, immediately after the redemption of such land-tax, be and become charged and chargeable, for the benefit of such bodies politic or corporate, or companies, or other person or persons, with such yearly sum or sums respectively, by way of rent-charge, as shall be equal in amount to the land-tax charged thereon at the times of such redemption, which shall be applicable in their hands to the same uses and purposes, and in the same manner, as the several yearly rents and profits of such manors, &c., shall from time to time be applicable.

Where land-tax on lands (except of bishops, &c., See sect. 88), let on beneficial leases, &c., shall be redeemed by sale of part, the unsold parts shall be chargeable to such corporations with an equivalent rent-charge. (See sect. 89, as to copyholds.)

Sect. 119. "That every deed whereby any sale, mortgage, or grant of any rent-charge shall be made by virtue of this act, in relation to estates in England, shall be enrolled within six calendar months after the execution thereof in one of his Majesty's courts of record at Westminster, or in the courts of the counties palatine of Chester, Lancashire, or Durham, or in the courts of great sessions in Wales, as the case shall require, or be registered in the counties of Middlesex and York, in the manner required by law for conveyances of real estates situated in those counties respective-

How deeds shall be enrolled in England;

in Scotland.

ly; and all deeds and conveyances in relation to estates in Scotland shall be executed and registered in the manner required by the law of Scotland

Where consideration is only 200*l.*

in respect of sales or charges of real estates: Provided always, that, where the consideration expressed in any such deed shall not exceed 200*l.*, the registry thereof, with the proper officer appointed or to be appointed for the registry of contracts for the redemption of land-tax, shall be as valid and effectual as if the same were enrolled or registered in the manner herein-before directed, and such officer is hereby required to register the same *gratis;* and after the payment of the purchase or mortgage money into the bank of England, or to the Receiver-General, or his deputy, in England, or to the collectors in Scotland (in cases where the same is by this act authorized to be paid to any Receiver-General or his deputy, or collector), in the manner hereinbefore directed, and after such enrolment or registry as aforesaid, every such deed of sale, mortgage, or grant, made by virtue of this act, shall be good, valid, and effectual in the law, to all intents and purposes whatsoever: Provided always, that any deed or deeds required by the said several acts passed for the redemption of the land-tax, or any of them, to be enrolled or registered, shall be valid and effectual, although the same shall not have been enrolled or registered within the periods prescribed by the said acts, provided the same be enrolled within six calendar months after the passing of this act †.

On payment of money and enrolment, deeds shall be valid.

Former deeds may be enrolled within six months.

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† Several of the recent acts contain provisions for enlarging the time for enrolling deeds: the last enactment of this kind is in stat. 57 Geo. 3, c. 100, sect. 24, which provides, "That all deeds required by the said acts*, or any of them, to be enrolled or registered, shall be valid and effectual, although the same should not have been or shall not be enrolled or registered within the periods prescribed by the said acts respectively, provided the same shall have been enrolled or registered *before the passing of this act,* or shall be enrolled or registered *within twelve calendar months after the passing thereof;* and that in case any such deeds shall not be enrolled or registered within twelve calendar months after the passing of this act, or any deeds *hereafter* to be executed under the powers of the said acts, or any of them, or of this act, shall not be enrolled or registered *within six calendar months after the execution thereof respectively, it shall be lawful for any two or more of the commissioners* for the time being for the redemption and sale of the land-tax, if they shall think fit, *upon the production of any such deeds, to order the same to be enrolled or registered;* and that all deeds to be enrolled or registered pursuant to any such order, shall be as valid and effectual as if the same had been enrolled or registered within the periods prescribed by the said acts or by this act; and that all conveyances made subsequent to any deeds already enrolled or registered, or to be enrolled or registered, under this act, and depending in point of title on

Stat. 57 Geo. 3, c. 100. Enlargement of time for enrolling deeds.

Power to commissioners to order deeds to be enrolled, &c.

* *i. e.* the acts relating to the redemption of the land-tax.

Sect. 120. "That the proof of the due execution of any deed of sale, enfranchisement, mortgage, or grant, under the provisions of the said recited acts or of this act, by the respective commissioners, parties thereto, shall be allowed and admitted in all courts and places, and before all persons, to be good and sufficient evidence that the several notices and other acts, matters, and things, required by the said recited acts or this act, to be given and done by any vendor, or mortgagor, or any grantor of any rent-charge, previously to any such sale, mortgage, or grant, were duly given, done, and performed, by such vendor, mortgagor, or grantor, pursuant to the directions of the said recited acts or of this act.

Proof of execution of deeds by commissioners shall be evidence that every thing required was duly done.

Sect. 121. "That in all cases where any money hath been or may hereafter be paid into the bank of England, to be placed to the account of the commissioners for the reduction of the national debt, as the whole or part of the purchase money for any manors, messuages, lands, tenements, or hereditaments, sold or contracted to be sold by any bodies politic or corporate, or companies, or feoffees or trustees for charitable or other public purposes, or other person or persons, and it shall appear to the satisfaction of the said commissioners appointed under the great seal, in cases where such sales or contracts for sale shall have been made under their authority, or to the satisfaction of the commissioners for the affairs of taxes in all other cases, that such money ought not to have been so paid, then, and in all such cases, it shall be lawful for the said commissioners appointed under the great seal, by writing under their hands or the hands of any two of them, and for the said commissioners for the affairs of taxes, or any three or more of them, respectively, to order and direct the Governor and Company of the Bank of England, and such Governor and Company are hereby required, to repay all such monies to the person or persons by whom or on whose account the same shall appear to have been paid into the Bank; and in all cases where such money shall have been already invested in the purchase of three pounds *per centum* Bank Annuities, in the names of the commissioners for the reduction of the national debt, upon a certificate signed by any two or more of the said commissioners appointed under the great seal, or by any three or more of the said commissioners for the affairs of taxes, as the case may be, that such money ought not to have been so invested, it shall be lawful for the said commissioners for the reduction of the national debt, or any one or more of them, and he or they is and are hereby required, to transfer the stock which has been so bought by or transferred to them, to the person or persons by whom or on whose account such money shall have been paid into

Where money has been improperly paid into the Bank, commissioners under the great seal, or commissioners for taxes, may order the money to be repaid; or stock purchased therewith to be transferred.

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such deeds, shall be of the same effect as if such deeds had been enrolled or registered on the day of the date thereof; nevertheless, without prejudice to the validity of any assurances heretofore made, or hereafter to be made, to correct or supply any defects arising from the want of such enrolment or registry."

the Bank, and with which money such stock had been so purchased; and the receipt and receipts of such person and persons shall be sufficient discharges for such monies or stock.

By sect. 122, contracts under former acts may be completed under this act.

Where any person having an estate other than of inheritance, shall redeem the land-tax with his own property, the estate shall be chargeable with the amount of the consideration, and interest equivalent to land-tax redeemed; reversioners shall be liable to interest only from coming into possession: reversioners redeeming shall be entitled to such yearly equivalent until the estates vest in them.

Sect. 123. "That where any person or persons having any estate or interest (other than an estate of inheritance) in any manors, messuages, lands, tenements, or hereditaments, shall redeem the land-tax charged thereon by or out of his, her, or their own absolute property, such manors, &c., shall be and become chargeable for the benefit of such person or persons, his, her, or their executors, administrators, or assigns, with the amount of the three pounds *per centum* Bank Annuities which shall have been transferred, or with the amount of the monies paid as the consideration for the redemption of such land-tax, as the case may be, and with the payment of a yearly sum or sums of money by way of interest thereon, equal in amount to the land-tax redeemed: Provided always, that no person or persons in remainder, reversion, or expectancy, or having any future interest in such manors, &c., as aforesaid, who shall afterwards, in order of succession, come into the actual possession or be beneficially entitled to the rent and profits of any such manors, &c., shall be liable to the payment of any yearly sum or sums of money by way of interest as aforesaid, save only from the time they shall respectively come into possession, or be beneficially entitled as aforesaid: Provided also, that where the land-tax charged on any manors, &c., shall be redeemed by any bodies politic or corporate, or companies, or any feoffees or trustees for charitable or other public purposes, or other person or persons having any estate or interest in remainder, reversion, or expectancy therein, or being substitute heirs of entail entitled in their order to succeed thereto, such bodies politic, &c., as aforesaid, shall, in the mean time, until their respective estates and interests vest in possession by reason of the determination of the preceding estate, be entitled to have a yearly sum issuing out of such manors, &c., equal in amount to the land-tax so redeemed.

Where a co-parcener redeems his own proportion of the land-tax, and the proportions of others, their lands shall be chargeable to him for their proportions. (See ss. 11, 93).

Sect. 124. "That where any one or more of any persons seised or entitled in undivided shares of or to any manors, messuages, lands tenements, or hereditaments, as co-parceners, heirs portioners, tenants in common, or joint tenants, shall not only redeem his, her, or their own proportion or proportions of the land-tax charged thereon, but also the proportion or proportions of any others or other of such co-parceners, heirs portioners, tenants in common, or joint tenants, whereby the whole of the said manors, &c., will be exonerated from the said land-tax, the share or shares of such of the co-parceners, &c., whose proportion or proportions of land-tax shall have been redeemed by the others or any other of them, of and in such manors, &c., shall be and become chargeable for the benefit of the person or persons redeeming the same, his, her, or their executors, administrators, or assigns, with so much of the stock transferred, or so much

of the money paid as the consideration for the redemption of the land-tax, as would have been sufficient to redeem such proportion or proportions of the land-tax of the others or other of such co-parceners, &c., and also with the payment of such a yearly sum of money by way of interest, as shall be equal in amount to such proportion or proportions respectively.

Interest or rent-charge, shall be payable at the periods when land-tax was.

Sect. 125. "That in all cases where any bodies politic or corporate, or companies, or other person or persons redeeming any land-tax, shall by virtue of this act be entitled to have and receive out of any manors, messuages, lands, tenements, or hereditaments, any yearly sums of money by way of interest, or by way of rent or of rent-charge, equal in amount to the land-tax redeemed, such yearly sum shall be payable on the same days as such land-tax was payable at the time of the redemption thereof (unless where any other days are herein specified for that purpose*), and shall be recoverable by action, suit, distress, or any other means whereby rents reserved on leases are recovered by law.

*See sect. 126.

Where a tenant is bound to pay land-tax, the amount of it, if redeemed by the person entitled to the rent, shall be payable as rent.

Sect. 126. "That where any tenant or lessee at a rack rent for any term or number of years or at will, of any manors, messuages, lands, tenements, or hereditaments, shall be bound by agreement to pay the land-tax charged thereon during the continuance of any demise, and such land-tax shall have been or shall be redeemed by or on the behalf of the bodies politic or corporate, or companies, or other person or persons beneficially entitled to the rent reserved or made payable on such lease or demise, the amount of the land-tax so redeemed shall, during the continuance of such lease or demise, be considered as rent reserved or made payable thereon, and the same shall be payable on the same days, and the same powers shall be had, used, and enjoyed, for the recovery thereof, as for the recovery of such rent when in arrear.

Persons redeeming land-tax on lands subject to any fee-farm rent, &c., may continue to deduct the proportion of land-tax on such fee-farm rents, &c., under 38 Geo. 3, c. 5.

Sect. 127. "That where any bodies politic and corporate, or companies, or other person or persons, shall, by virtue of the said recited acts, have redeemed, or shall, by virtue of this act, redeem, any land-tax charged upon any manors, messuages, lands, tenements, or hereditaments, which, at the time of such redemption, were or shall be charged with or subject to the payment of any fee-farm, feu-duty, or other annual rent, for which such bodies politic, &c., would upon payment of the land-tax have been entitled, to abate and deduct a just proportion of rate under the said recited act of the 38th year of his present majesty's reign, for granting an aid to his majesty by a land-tax, it shall be lawful for all such bodies politic, &c. to continue to abate and deduct a just proportion, from time to time, upon any payment of such fee-farm, feu-duty, or other annual rent, as if such land-tax had not been redeemed.

Guardians, &c., may transfer stock standing in the names of infants, &c. or jointly with

Sect. 128. "That it shall be lawful for all guardians, tutors, and curators of infants, and for all trustees for married women, who have contracted or who shall contract on their behalf for the redemption of land-tax, charged on any manors, messuages, lands, tenements, or hereditaments, wherein

themselves, for redemption of land-tax.

such infants or married women shall be interested, to transfer to the commissioners for the reduction of the national debt, so much of three pounds *per centum* consolidated, or three pounds *per centum* reduced annuities, which shall be standing in the name or names of such infants or married women, either solely or jointly with such guardians, tutors, curators, or trustees, or any of them, as shall be sufficient for the redemption of the land-tax contracted for; and the Governor and Company of the Bank of England are hereby authorized and required to permit and suffer such transfers to be made; and the cashier or cashiers of the Bank of England shall give a certificate or receipt for the stock to be so transferred, which shall be an acquittance and discharge to such guardians, tutors, curators, or trustees, transferring such stock as aforesaid; and the said Governor and Company, and their respective officers, are hereby indemnified against all persons whatever for any transfer made in pursuance of this act.

No contracts for redemption under this act, or the amount of land-tax redeemed, shall be any way affected by any appeal from assessment of land-tax.

Sect. 129. "That no contract entered into after the passing of this act, for the redemption of any land-tax, nor the amount of land-tax redeemed thereby, shall in anywise be impeached, affected, or altered, by the judgment or determination of the commissioners on any appeal from the assessment by which such land-tax shall have been charged, whether such appeal shall have been made prior or subsequent to any proceedings had under this act for the purpose of entering into such contract; but such appeal shall be decided wholly between such other parties charged by such assessments as shall not have entered into any such contract, and in the same manner as if the contract so entered into had been completed before the making or determining such appeals; and every contract so entered into shall stand good, and the land-tax redeemed thereby shall be considered as if no such appeal had been made from such assessment.

But if land-tax contracted for shall have been fraudulently reduced within three years before completion of contract, it may be altered on appeal within one year after.

Sect. 130. "That if such land-tax so contracted for, shall have been reduced in its amount by any assessment made within three years preceding the time of completing such contract, and any such appeal shall be made against the party who shall have entered into the contract for the redemption of such land-tax, his or her heirs or assigns, and it shall be found to the satisfaction of the commissioners before whom such appeal shall be heard, and shall be adjudged by them that the reduction in the amount of the assessment land-tax so redeemed, was fraudulently made, or was obtained by some undue practice or false representation of the value of the estate of such party, in the parish or place where such assessment was made, or of the proportion of value which his or her estate bore to other estates or incomes liable to be assessed in the same parish or place, so as to prove to the satisfaction of such commissioners that such reduction was wrongfully made, then and in such case, but not otherwise, the land-tax so contracted for shall remain liable to be revised and altered (in the same manner as if the contract for the same had not been completed), by any determination on any appeal which shall be made and determined within one year next after the completion of such contract.

(The intervening omitted sections relate to the redemption of the land-tax in the crown lands, including those of the duchy of Lancaster, and lands belonging to the duchy of Cornwall).

As to Contracts for the Purchase † of Land-Tax.

Where the whole of the land tax shall not, before June 24, 1803, be redeemed, by parties entitled to preference (see s. 18), commissioners may contract with any other persons for sale of the part remaining unsold.

Sect. 151. "That where the whole of the land-tax charged on any county, riding, stewartry, city, borough, cinque port, town, or place in respect of the manors, messuages, lands, tenements, or hereditaments therein, shall not, before or on the 24th day of June, 1803, have been redeemed by the bodies politic or corporate, or companies, or other person or persons having the benefit of preference by virtue of the said recited act, relating to the redemption of land tax, or of this act, but any part thereof shall then remain chargeable for the benefit of his majesty, his heirs, and successors, it shall be lawful for the commissioners acting in the execution of this act, by virtue of his majesty's warrant under the royal sign manual, for such county, &c., to contract and agree with any other bodies politic, &c., for the sale of the land-tax so remaining unredeemed, and then chargeable as aforesaid, or any parts or parcels thereof, upon the terms and conditions and in the manner hereinafter directed; and all such rules, methods, regulations, and directions, as are herein prescribed with respect to the redemption of land-tax by any bodies politic, &c., having such benefit of preference as aforesaid, shall be observed, practised, and put in execution, with respect to sales of land-tax by virtue of this act, in so far as such rules, methods, regulations, and directions are respectively applicable thereto.

All rules for redemption shall be applied to such sales.

The consideration for the purchase of such land-tax, shall not be less in stock or money, than for redemption by parties entitled to preference (see ss. 22, 23), transferable or payable at once, or within one year, by not more than four instalments.

Sect. 153. "That the consideration to be given for the purchase of any such land-tax, shall be so much capital stock at the least, in either of the three pounds *per centum* Bank Annuities, transferable at the Bank of England as aforesaid, as is hereinbefore directed to be transferred as the consideration for the redemption of any land-tax by persons having benefit of preference, or where the land-tax sold shall not exceed the annual sum of 25*l.*, then either so much at the least of the said Bank Annuities as aforesaid, or so much in lawful money of Great Britain as hereinbefore is directed to be paid as the consideration for the redemption of any land-tax (in cases where the consideration for such redemption shall be in money), according to the tables, rules, and directions contained in the said schedule, marked (L.), and the price of stock to be ascertained and transmitted to the Receiver-General or collector in the manner hereinbefore directed in cases of the redemption of land-tax; and the whole amount of such consideration shall be transferred or paid either at one time (in which case the same shall be transferred or paid within the space of three months from the date of the contract), or by any number of instalments, within the period of one year from the date of such contract, so as that such in-

† It is necessary, throughout the act, to keep in view the distinction between the *redemption* and the *purchase* of the land-tax.

stalments shall not exceed four in number, and shall be made at equal intervals of not more than three months from each other, on such days as the party shall elect, and cause to be stipulated in the contract; with power for the contractors respectively to transfer or pay the whole or any part of such consideration in advance, in the manner and under the restrictions herein prescribed in cases of transfers and payments made in advance for the redemption of land-tax.

Persons desirous of purchasing shall produce to commissioners of land-tax a statement of the amount, &c., of the land-tax. Such commissioners, &c., shall ascertain and certify the amount according to schedule (A.) [For fee, see s. 163.]

Sect. 154. "That all and every bodies politic or corporate, or companies, or other person or persons desirous of purchasing the land-tax charged upon any manors, messuages, lands, tenements, or hereditaments, shall make out and produce to any two of the commissioners of land-tax acting in and for the hundred, ward, lathe, wapentake, rape, or other division of the county, riding, city, borough, cinque port, town, or place, if in England, or, if in Scotland, to the commissioners of supply of the county or stewartry, or the chief magistrate of the city or burgh within which the same shall be situate, a schedule or statement in writing of the land-tax proposed to be purchased, and of the manors, &c., whereon the same is charged, and the said commissioners of land-tax or supply, or chief magistrate, respectively, shall thereupon ascertain the amount of the land-tax proposed to be purchased, and the respective manors, &c., whereon the same is charged, and shall grant a certificate thereof in the form in the schedule to this act annexed, marked (A.), to the bodies politic, &c., applying for the same, which certificate shall contain the description of such manors, &c., distinguishing the parishes or places wherein the same may be situate, and also the name or names of the proprietor or proprietors, and the occupier or occupiers thereof; and, where such manors, &c., shall be separately assessed, shall distinguish the amount of each separate assessment of land-tax; and such bodies politic, &c., shall produce such certificate to the commissioners acting in the execution of this act, by virtue of his majesty's warrant under the royal sign manual; and where the land-tax, proposed to be purchased shall not exceed 25*l.*, shall also give notice in writing to such commissioners whether the consideration is proposed to be in stock or money, and, if in money, then, whether the same is proposed to be paid in one sum or by instalments, and also the day or days on which the same is proposed to be paid; and the said last-mentioned commissioners are hereby authorized and required to examine and amend such certificate, if necessary, and thereupon to cause notice in writing to be fixed on the church door of the parish or place where the manors, &c., the land-tax whereon shall be so proposed to be purchased, shall be situate, of the offer made to purchase such land-tax, at least fourteen days before any contract shall be entered into by them for the sale thereof; and in case no other offer or offers shall be made within the said period of fourteen days, by any other bodies politic, &c., to purchase such land-tax for a higher price, exceeding the price offered to be given by such first-mentioned bodies politic, &c., by one pound *per centum* at the least upon the

On producing certificate, &c. to commissioners for executing this act (who may amend the same), they shall cause notice of the offer to be fixed on the church door for 14 days.

If within that time no offer higher by 1*l. per cent.* shall be made, they may contract for sale;

amount of the stock or money so offered to be transferred or paid as the price for the same, then, and in such case, it shall be lawful for the said last-mentioned commissioners to contract and agree with the bodies politic, &c. first offering to purchase such land-tax, for the sale thereof, according to the directions of this act; but, if any other bodies politic, &c. shall, within such period as aforesaid, offer to purchase such land-tax at a higher price, exceeding the offer so first made by one pound *per centum* upon the amount of such stock or money, at the least, then, and in such case, it shall be lawful for such commissioners, and they are hereby required, to contract and agree for the sale of such land-tax to the bodies politic, or corporate, or other person or persons who shall within such period offer the highest price for the purchase thereof, and the said commissioners shall cause to be inserted in every such contract, the description of the manors, &c. and other particulars relative thereto, hereinbefore directed to be inserted in such certificates; and upon the production of such contract at the Bank of England, in cases where the consideration shall be in stock, and upon the transfer to the commissioners for the reduction of the national debt, of the Three Pounds *per centum* Bank Annuities, to be transferred as the consideration for the purchase of such land-tax, or of such proportion of such Bank Annuities as shall have been agreed to be transferred as the first instalment thereof, being not less than one-fourth part of the whole amount of such Bank Annuities; and in cases where the consideration shall be in money, then, upon the production of such contract to the Receiver-General for the county, riding, or place in England, or his deputy, or the collector for the shire, stewartry, or place in Scotland, where the manors, &c., of which the land-tax shall be so purchased, shall be situate, and upon payment to such Receiver-General, or his deputy, or such collector, of the sum or sums of money to be paid as the consideration for such purchase, every such body politic or corporate, or company, or other person or persons, shall be entitled to the like certificates or receipts from the cashier or cashiers of the Governor and Company of the Bank of England, and from every Receiver-General, or his deputy, and collector, as hereinbefore is directed in cases of the transfer or payment of the consideration for the redemption of any land-tax; and, upon the registry of such contract, and also of the certificate of such commissioners of supply, or chief magistrate, as aforesaid, in the manner directed by this act, the manors, &c., the land-tax whereof shall be so purchased, shall be wholly freed and exonerated from such land-tax, and all further assessments thereof, and all claims of his majesty, his heirs and successors, in respect of the same, from the like periods as are herein directed in cases of redemption of land-tax; but the respective purchasers of such land-tax, and their heirs, successors, and assigns, shall, from such period of exoneration, be entitled to demand, have, and receive for their, his, or her own use, for ever, and

but if such higher offer shall be made, the commissioners shall contract with the party making it.

Upon production of the contract at the bank, and transferring the stock, or to the Receiver-General, &c., and payment of the consideration, the party shall be entitled to certificates; and on registry of the contract and certificate, (see sect. 38, 164), the lands shall be exonerated from the land-tax, and the purchaser entitled to a fee-farm rent out of the lands, equal to the land-tax redeemed.

shall, by virtue of this act, be adjudged, deemed, and taken to be in the actual seisin and possession of a yearly rent or sum, as a fee-farm rent, equal, in amount, to the land-tax so purchased by him, her, or them, free of all charges and deductions whatever, to be issuing and payable out of the manors, &c., whereon the land-tax so purchased was charged, on the same days as such land-tax was payable at the time of the purchase thereof; and such respective purchasers, their heirs, successors, and assigns, shall have priority of security on such manors, &c., in respect of such annual sum or rent, over every other incumbrance thereon, and shall have and enjoy all such powers, remedies, benefits, and advantages, for the recovery thereof, whether by action, suit, distress, or otherwise, as landlords by law have or can enjoy for the recovery of rents reserved on leases: Provided always, that the sale of any such land-tax, and the exoneration of the manors, &c., therefrom, shall not in any manner prejudice or affect the right or title of his majesty, his heirs or successors, to any arrears of such land-tax remaining unpaid up to the period of such exoneration, or prevent his majesty, his heirs or successors, from using all such ways and means for recovering such arrears, as his majesty, his heirs or successors, could or might have used in case such land-tax had not been sold.

Sale of land-tax shall not affect the right to arrears.

Sect. 155. "That if any proprietor or proprietors, or person or persons beneficially interested in any manors, messuages, lands, tenements, or hereditaments, which shall stand settled or limited to or for the same uses, trusts, intents, or purposes, and in the same order and course of limitation, and be subject to the same charges, liens, and incumbrances, the land-tax whereof shall have been purchased, or shall be proposed to be purchased, shall be desirous that such land-tax shall, after the purchase thereof as a fee-farm rent, be paid and borne out of any particular part or parts only of the said manors, &c., and shall give notice in writing of such his, her, or their desire, to the said commissioners acting in the execution of this act as last aforesaid, then and in such case it shall be lawful for the said commissioners to order and direct that the whole of such fee-farm rent, whether consisting of one or of several assessments of land-tax, shall in future be paid and borne out of any part or parts only, and out of what part or parts of the said manors, &c., of which the land-tax shall be so proposed to be purchased as aforesaid; and in every such case the part or parts of such manors, &c., out of which such fee-farm rent shall be directed to be paid or borne, shall from thenceforth be exclusively subject thereto, and to the several powers and remedies for the recovery thereof hereinbefore mentioned; and the rest of such manors, &c., shall from thenceforth for ever be wholly and absolutely freed and discharged, as well from the fee-farm rent acquired by such purchase as from the land-tax before charged thereon: Provided always, that the annual value, to be let, of the part or parts of any such manors, &c., which shall be so made exclusively subject to the payment of any such fee-farm rent as aforesaid, shall not be less in amount than three times the amount of such fee-farm rent at the

On the desire of the person beneficially interested in the lands, the commissioners may order the whole fee-farm rent to be paid out of any part of the lands, equal in annual value to three times the rent.

least: Provided also, that the part or parts of such manors, &c., which shall be so made exclusively subject to such fee-farm rent, and the part or parts discharged therefrom, shall be separately described and distinguished in the contract, or where the contract shall have been previously entered into, then in an indorsement thereon, or in a schedule annexed thereto, under the hands and seals of any two or more of such commissioners.

such part shall be separately described in the contract.

Sect. 156. "That the certificate of the contract for the purchase of any such land-tax shall be in the form mentioned in the schedule to this act annexed, marked (D.).

Form of certificate of contracts. [See schedule (D.)].

Sect. 157. "That it shall be lawful for all and every person and persons who shall become entitled to any fee-farm rent, by the purchase of any land-tax sold in pursuance of the provisions of this act, to bar and destroy any entail thereof, which might have been barred by recovery or fine, by deed acknowledged by such person or persons, and enrolled in one of his majesty's courts of record at Westminster, or in the courts of the counties palatine of Chester, Lancaster, or Durham, or in the courts of great session in Wales, or registered in the office for registering deeds in the counties of Middlesex or York, as the case shall require.

Owners of such fee-farm rents may bar the entail by deed enrolled, &c.

By sect. 158, where land-tax shall be purchased by a tenant not bound to pay it, he may retain the amount out of the rent.

Sect. 159. "That it shall be lawful for all bodies politic or corporate, or companies, and feoffees and trustees for charitable or other public purposes (notwithstanding any statutes of mortmain, or other statutes or laws to the contrary), and also for all and every other persons or person who, by this act, are or is authorized to lay out or invest any personal trust property, or other funds, in the redemption of land-tax charged on any manors, messuages, lands, tenements, or hereditaments, to lay out and invest any such personal trust property, or other funds, under the like restrictions and regulations, in the purchase of any land-tax which shall be sold in pursuance of the provisions of this act; and the amount of such land-tax shall, as a fee-farm rent, stand settled and limited by virtue of this act to such uses, and subject to such trusts, and for such intents and purposes, as the manors, &c., belonging to such bodies politic or corporate, or companies, or feoffees or trustees for charitable or other public purposes, or other person or persons, the land-tax whereof might have been redeemed by such personal trust property or other funds, by virtue of this act, shall stand settled, limited, or subject to; and where any personal trust property shall be subject to any trust, to apply the same in the purchase of real estate, to be settled to or for any particular uses, intents, or purposes, for the benefit of any bodies politic or corporate, or companies, or any feoffees or trustees for charitable or other public purposes, or other person or persons, it shall be lawful to apply the same in the purchase of any land-tax to be sold under the provisions of this act; which land-tax, when purchased, shall, as a fee-farm rent, stand settled and limited to such uses, and subject to such trusts,

Trust property may be laid out by corporations, &c., in purchase of land-tax (as well as redemption, under ss. 41, 42), and the amount as a fee-farm rent shall be settled, subject to the same trusts.

and for such intents and purposes to and for which such real estate, if purchased, ought to have been conveyed, settled, and limited, according to the terms of such trust.

Surplus arising from sales, &c., for redeeming land-tax, may be applied in purchasing land-tax as a fee-farm rent.

Sect. 160. "That where any surplus stock or money arising by any sale, mortgage, or grant, made or to be made by virtue of the said recited acts or of this act, for the purpose of redeeming any land-tax, shall remain, after reserving so much thereof as shall be necessary to be transferred or paid as the consideration for the redemption of such land-tax, it shall be lawful to apply such surplus stock or money (but nevertheless under such direction as is herein made necessary for any other application of such surplus), in the purchase of any land-tax as fee-farm rents under the provisions of this act, which shall, when so purchased, stand settled and limited to, for, and upon, the like uses, trusts, intents, and purposes, as the hereditaments, so sold, mortgaged, or charged, stood settled and limited.

By sect. 161, governors of Queen Anne's bounty, and other trustees for poor clergy (empowered to redeem land-tax, see sect. 44, 45), may purchase land-tax, which shall issue as a fee-farm out of the lands, and be annexed to the livings; and to accept from others land-tax so purchased.

By sect. 162, gifts of land-tax redeemed or purchased for augmentation of livings, shall be valid.

Miscellaneous Provisions.

Fee for certificate of amount of land-tax—1*s.* (See ss. 30, 154).

Sect. 163. "That no greater fee or reward shall be taken or demanded by any clerk to the commissioners of land-tax or supply, or chief magistrate of any city or borough, for any certificate of the amount of any land-tax granted under the authority of this act, than one shilling, in respect of each sum so certified.

Where purchasers die without completing contracts, the instalments shall be paid out of the assets, and if deficient the contract may be sold:

Sect. 166. "That if any person who shall have entered into any contract for the redemption or purchase of any land-tax, by virtue of the said recited acts or of this act, shall have died or shall die before the transfer or payment of all the instalments of the consideration contracted to be transferred or paid by him or her, without having made any provision, by will or otherwise, how the future instalments shall be made good, then and in such case the future instalments shall be paid out of the assets of the persons so dying, as a debt to his Majesty upon record, and the executors or administrators of the person so dying, and the trustee or trustees, guardian or guardians, tutor or tutors, curator or curators, of any infant, minor, or other person entitled to the estate and effects of the person so dying, shall be indemnified against such infant or minor, and all other persons whomsoever, for making good the instalments necessary to complete the said contract; and if such executor or administrator, trustee, guardian, tutor, or curator, shall not have assets for that purpose, then they shall and may, and they are hereby respectively authorized and empowered to sell, assign, and dispose of the said contract: Provided always, that when the person so dying shall have contracted for such land-tax, under the benefit of prefer-

But if the person who shall become into pos-

ence given by the said recited acts or this act, without having the absolute estate or interest in the manors, messuages, lands, tenements, or hereditaments whereon the same was charged, and the person or persons having the next immediate beneficial estate or interest in succession, reversion, remainder, or expectancy, and which shall have become vested in possession by reason of the determination of the preceding estate or interest of the person so dying, or his, her, or their guardian or guardians, or tutor or tutors, in cases of infancy, or committee or committees, or curator or curators, in cases of lunacy, shall be desirous of taking an assignment of such contract in order to complete the same, then and in such case it shall be lawful for the executors or administrators of the person so dying, to sell and assign such contract to the person or persons whose estates shall so have become vested in possession, or the guardian or guardians, tutor or tutors, committee or committees, curator or curators, of such person or persons, on his, her, or their behalf, whether such executors or administrators shall have in their hands assets of the deceased person or not: Provided also, that the person or persons to whom such contract shall be assigned, shall be bound to complete the same, upon the same terms and conditions, by the same instalments, and at the same periods, and in the same manner, and have and be entitled to the same benefits and advantages, as the person so dying would have been bound to complete the same, or would have been entitled to, in case he or she had been then living: Provided always, that the respective courts of Exchequer, or the commissioners for the affairs of taxes, may in all such cases give the like relief, by enlarging the time for making good any future instalment or instalments, as they are hereby authorized to do in cases of forfeiture through the default of the party.

session shall be desirous of taking the contract, it may be assigned to him, whether there are assets or not. (See sect. 91, as to raising money to complete such assignment.)

Assignees shall complete contracts on original terms.

Time for payment of instalments may be enlarged. (See sect. [illegible])

Sect. 167. "That if any person or persons, after entering into any such contract as aforesaid for the redemption or purchase of any land-tax, shall afterwards neglect or refuse to complete the same by the due and regular transfer or payment of the consideration (whether by instalments or otherwise) agreed to be made thereon, then and in every such case, and immediately after default shall be made in the transfer or payment of such consideration, or any part thereof, such contract shall become null and void, and the whole of the land-tax so contracted for shall be revived and again become chargeable on the manors, messuages, lands, tenements, or hereditaments, whereon the same was charged prior to such contract, and such land-tax (whether the same shall have been redeemed or purchased) shall be again assessed, raised, levied, and collected, for the use of his majesty, his heirs and successors, or be again sold by the commissioners acting in the execution of this act, by virtue of his majesty's warrant under the royal sign manual, in the same manner as if such contract had not been entered into; and the person or persons so making default shall, for the non-performance of the contract, be subject to a penalty not exceeding one sixteenth part of the consideration agreed to be transferred or paid

On default in fulfilling contracts, land-tax shall revive, and defaulter shall be subject to a penalty not exceeding one sixteenth of the consideration.

How such penalty shall be calculated.

on such contract; and in cases where the consideration to be transferred shall be three pounds *per centum* consolidated Bank Annuities, and no part thereof shall have been transferred, the amount of the penalty shall be the value of such sixteenth part of the consideration, according to the average price of three pounds *per centum* consolidated Bank Annuities on the day on which the transfer of such consideration, or the first instalment thereof, ought to have been made; or in case the books for entering transfers of such annuities shall then be shut, then according to the average price of three pounds *per centum* reduced Bank Annuities on such day.

Where land-tax shall revive, commissioners of land-tax, &c. shall, within six months, deliver a schedule to the Receiver-General, and transmit a duplicate to the king's remembrancer in England, or barons of Exchequer in Scotland, specifying the amount, &c.

Sect. 168. "That where any land-tax shall have been, or shall be revived and again become chargeable on any manors, messuages, lands, tenements, or hereditaments, by virtue of the said recited acts or of this act, the commissioners of land-tax, or supply, acting in and for the division or place, county or stewartry, or the chief magistrate of the city or borough within which such manors, &c., shall be situate, or any three of them, shall, and they are hereby required, within six calendar months after such land-tax shall be so revived, to deliver or cause to be delivered a schedule or duplicate in parchment, under their hands and seals, to the Receiver-General for the county, riding, division, or place, if in England, or his deputy, or to the Receiver-General, if in Scotland, and shall transmit or cause to be transmitted a like schedule or duplicate into the King's remembrancer's office, if in England, and to the barons of the Exchequer, if in Scotland; which schedule or duplicate shall contain and specify the amount of the land-tax so revived and again become chargeable, and the year in which, and the period from whence, such land-tax shall have been revived; and in case such land-tax shall have become revived from any period preceding the commencement of the year in and for which such schedule or duplicate shall be made out as aforesaid, such schedule or duplicate shall also contain and specify the amount of the arrears of such land-tax up to the commencement of such year as aforesaid; distinguishing the amount of the land-tax so revived and again become chargeable, from the amount of such arrears as aforesaid.

By sect. 169, on such forfeitures, courts of Exchequer may enlarge the time for making instalments, and grant relief; and where penalty does not exceed 50*l.*, Tax Office, with approbation of the Treasury, may grant relief.

By sect. 170, where penalty on default has not been prosecuted for, commissioners for national debt, &c., may reserve the amount out of any instalments made, and re-transfer the remainder.

By sect. 171, where stock has been improperly transferred, or money paid to the bank for interest, such stock may be re-transferred, &c., on certificate from Tax Office; who may also direct Receivers-General to repay monies improperly paid.

By sect. 172, where stock shall be re-transferred, the dividends shall be issued and payable as if there had been no transfer to the commissioners for the national debt.

By sect. 173, contracts, assignments, copies of register, certificates, transfers, letters of attorney, and affidavits, exempted from stamp duty. (And see sections 68, 81, 107).

By sect. 180, the whole land-tax charged on any place shall be inserted in the certificate of assessment, so long as any part shall remain payable. [See section 40.] Lands not exonerated, shall be subject to a yearly assessment not exceeding 4*s.* in the pound, on the value, under 38 Geo. 3, c. 5.

Whenever the whole land-tax in any place shall be redeemed, &c., assessments shall cease.

Sect. 182. "That whenever in any parish or place separately assessed to the land-tax, the whole of the land-tax charged upon the manors, messuages, lands, tenements, or hereditaments in such parish or place shall have been redeemed or purchased, and all the manors, &c., therein shall be exonerated, under and by virtue of the said recited acts or of this act, from the payment of any sum or sums of money as land-tax, all assessments in such parish or place by virtue of this act shall cease and determine.

By sect. 197, persons aggrieved in any sale of land-tax (where consideration shall not exceed 500*l.* stock), may appeal to the commissioners of appeal at the next petty sessions, and where consideration exceeds 500*l.* stock, may petition the Court of Chancery.

Sect. 200. "And whereas doubts may arise by reason of the provisions of an act, passed in the nineteenth year of the reign of his late majesty king George the second, intituled, 'An Act for better regulating of Elections of Members to serve in Parliament for such Cities and Towns in that part of Great Britain called England, as are Counties of themselves;' and of another act passed in the twentieth year of the reign of his present majesty, intituled, 'An Act to remove certain Difficulties relative to Voters at County Elections,' as to the right of voting for the election of knights of the shire, or other members, to serve in Parliament, by persons who may claim so to vote in respect of messuages, lands, or tenements, the land-tax charged whereon may have been redeemed; be it therefore enacted, that every person who shall tender his vote at the election of any knight or knights of the shire, or other member or members, to serve in Parliament, within that part of Great Britain called England, or the principality of Wales, in respect of any messuages, lands, or tenements, of the quality and value which would by law entitle him to vote at such election, the land-tax charged whereon shall have been redeemed or purchased, shall, from and after the passing of this act, be entitled to vote at any such election as aforesaid without being compelled to shew that such messuages, lands, or tenements, have been assessed to the land-tax, upon proving to the satisfaction of the returning officer, on oath or otherwise, that such land-tax hath at any time previously to such election been redeemed or purchased, and the said messuages, lands, or tenements, become exonerated therefrom, under the provisions of the said recited acts for the redemption of land-tax, or of this act, the said recited acts

19 Geo. 2, c. 28.

20 Geo. 3, c. 17.

Persons claiming to vote for members of Parliament in England or Wales for lands, the land-tax whereon has been redeemed, &c. shall be entitled to vote upon proving such redemption.

passed in the nineteenth year of his late majesty's reign, and in the twentieth year of his present majesty's reign, or any other act or law to the contrary notwithstanding.

Several statutes have been passed, since the general act of the 42 Geo. 3, for altering and amending its provisions.

The statute 45 Geo. 3, c. 77, enables incumbents of livings to purchase, for the benefit of the livings, land-tax which has been redeemed or purchased by the patron, and makes some other regulations of no very extensive application.

The statutes 46 Geo. 3, c. 133; 49 Geo. 3, c. 6; 54 Geo. 3, c. 173; and 57 Geo. 3, c. 100; authorize the commissioners to exonerate, for a certain period, small livings and charitable institutions, having an income not exceeding 150*l.*; but tenants at rack rent to continue to pay land-tax as reserved rent.

By stat. 57 Geo. 3, c. 100, s. 12, ecclesiastical or lay corporations, trustees for charitable and public purposes, and patrons of livings, are authorized to redeem on transferring so much three *per cent.* consols, or three *per cent.* reduced, as will yield a dividend *equal* to the land-tax; and sect. 14 provides that such corporations and trustees may declare in the redemption contract their desire that the lands redeemed shall not be liable to any annual rent charge in respect of such redemption under the existing acts.

Statute 50 Geo. 3, c. 58, extends the provision in stat. 42 Geo. 3, c. 116, s. 78, to corporations *sole*, and declares that every archbishop, &c. redeeming land-tax on livings, shall be entitled to a rent charge of equal amount, unless, at the time of presenting the clerk, he shall, by writing under seal, &c., declare the contrary.

The statute 52 Geo. 3, c. 80, merely enlarges the time for enrolling deeds. (As to which, *vide ante*, p. 416).

The statute 53 Geo. 3, c. 123, contains some important enactments †.

Consideration for redemption of land-tax whether in stock or money, transferred or paid by half-yearly instalments, &c.

Sect. 3, enacts "That upon all contracts to be entered into after the passing of this act for the redemption of any land-tax in Great Britain, the consideration for the same, whether in stock or in money, may be stipulated to be transferred or paid in equal sums by half-yearly instalments in each year, during the period stipulated for the transfer or payment thereof, as near as the same can be computed; that is to say, on or before the twenty-ninth day of September and the twenty-fifth day of March, in each year of assessment of the land-tax; and upon all contracts to be so entered into, the consideration may be stipulated to be paid wholly in money (whatever may be the amount of the land-tax proposed to be redeemed); and the

† Many sections of this act have been omitted, either because they have been before referred to, or because they merely relate to the duties of the commissioners or other officers, or are exclusively applicable to contracts entered into before the 25th of March, 1815.

amount of the money to be paid as the consideration for the redemption of such land-tax may in such cases either be calculated, settled, and ascertained, according to and in the manner directed by the acts in force at the time of passing this act, or according to the provisions contained in this act; and every such contract, where the consideration shall be in stock, to be ascertained according to the said acts in force at the time of passing this act, shall be made in the form contained in the schedule to this act annexed, marked [A. No. 1.]; and where the consideration shall be in money, to be ascertained according to the said acts, such contract shall be made in the form contained in the schedule to this act, marked [A. No. 2]; and where the consideration shall be in money, to be ascertained according to the provisions of this act and the rules herein contained, such contract shall be made in the form contained in the schedule to this act, marked [B.], except in the cases hereinafter mentioned.

Consideration stipulated to be transferred or paid in a period not exceeding sixteen years; periods regulated by amount of consideration, &c.

Sect. 4. "That in every contract to be entered into after the passing of this act, it shall be lawful to stipulate for the transfer or payment of the consideration within any period not exceeding sixteen years, as the parties shall choose, to be computed from the 25th day of March next preceding the date of the contract, by even and equal sums in each year, as near as the same can be computed; provided that the stock to be transferred within any year shall not be less than 100*l.* principal stock, nor the money to be paid within any year, less than 60*l.* of lawful money of Great Britain, the duration of the contract to be in each case regulated by the amount of the consideration thereon; and where the consideration shall not amount to 100*l.* stock, or to 60*l.* of like lawful money, the same shall be transferred or paid within one year from the date of the contract, in one sum, or by two equal instalments, as shall be specified in the contract, except in the cases hereinafter authorized.

No forfeiture to accrue, if payment of instalment made at next public receipt of land-tax.

Sect. 8. "That whenever any contract shall be made for the payment of the consideration for the redemption of any land-tax in money to the Receiver-General in England, or collector of the cess in Scotland, by two instalments, yearly, on or before the days herein mentioned, and it shall happen that the Receiver-General of the county, riding, division, or place, or the collector of the cess for the shire, division, or place, shall not be on his receipt of land-tax within thes ame county, riding, shire, division, or place, on the day when the payment shall become due, no forfeiture, charge of interest, or other loss, shall accrue by virtue of the said act or this act, if the party contracting for such payment shall pay or cause to be paid the amount then due on such contract, on the day appointed for the then next receipt of land-tax for that county, &c., where the said Receiver-General or collector shall attend for the receipt of land-tax.

By sect. 9, commissioners for taxes to circulate printed forms of notices of various modes of redemption of land-tax, and printed forms of declaration for parties to sign.

Clerk to commissioners of land-tax in England, and supply in Scotland, to deliver to party a certificate of amount of land-tax.

Sect. 10. "That the commissioners of the land-tax for the division or place, in cases where the manors, messuages, lands or other hereditaments, the land-tax charged upon which shall be proposed to be redeemed, shall be situate in England, or their clerk, and the surveyor of the district where the manors, &c., the land-tax charged upon which shall be proposed to be redeemed, shall be situate in Scotland, shall, upon the request of any bodies, companies, or persons, entitled to redeem such land-tax, or of their respective agents, make out and deliver to such bodies, &c., or their respective agents, certificates signed by such commissioners, or their clerk, or surveyor, of the amount of the land-tax proposed to be redeemed, which certificates shall contain the description of the premises, and the names of the respective owners and occupiers thereof, and the parish or place where the same shall be situate, as the same appear upon the land-tax assessment then in force; and the said bodies, companies, or other persons, desirous of redeeming such land-tax, may declare their intention of redeeming the same, and the mode and terms of redemption proposed by them, by filling up and signing, by themselves, or by some agent on their behalf, in the presence of the said commissioners, or their clerk, or of the said surveyor, as the case may require, the forms of declaration annexed to the notices hereby required to be circulated, in such manner as to declare the mode and terms under which they are willing to redeem the land-tax so certified.

Party desirous of contracting, to signify same and mode of redemption, by signing printed declaration.

Declaration attested, and transmitted with duplicate of certificate to commissioners.

Sect. 11. "That the commissioners, or their clerk, or surveyor, shall attest such signature, and forthwith transmit every such declaration, together with a duplicate of the certificate of the amount of the land-tax (to be signed by them or him, and to be annexed to such declaration), to the commissioners for the time being acting in the execution of the said acts and this act.

On receipt whereof, commissioners to sign certificate of contract for redemption.

Sect. 12. "That the commissioners for executing the said acts and this act, shall, upon the receipt of any such declaration, and of a copy of such certificate as aforesaid, make out and sign a certificate of contract with the parties by or on whose behalf such declaration shall be signed, for the redemption of the land-tax therein mentioned, according to such form as shall be applicable to the mode and terms of redemption to which such declaration so signed as aforesaid shall refer; which contract so entered into shall be binding upon the body or bodies, company or companies, or person or persons signing such declaration, their respective successors, heirs and assigns, and all owners of the lands whereon the land-tax intended to have been redeemed, shall be charged for the completion of such contract; and the said last-mentioned commissioners shall, in all cases where an assessment is required by this act to be made for the payment of the consideration, transmit an abstract of so much thereof as shall be necessary for the purpose of forming an assessment according to the directions of this act, to the commissioners of land-tax or supply in whose

division the land-tax contracted for is charged, which assessment shall be made according to the rules contained in the schedule to this act applicable to such contract; and in all cases where an assessment is not required for the purpose aforesaid, the said commissioners for executing the said acts and this act, shall notify their consent to such contract, to the respective contracting parties, as soon as the same can conveniently be done, and transmit such abstract thereof as may be necessary to ascertain the amount of stock to be transferred, or of money to be paid, previous to the registry of such contract.

Interest and dividends how applied.

Stat. 14. "That the interest and dividends from time to time to arise from stock transferred to or purchased by the commissioners for the reduction of the national debt, in pursuance of contracts entered into in the forms contained in the schedules marked (A.) and (B.) of this act, shall, as the same arise or grow due, cease to be issued at the receipt of the exchequer, or to be charged on the consolidated fund of Great Britain; and the interest and dividends from time to time to arise from stock purchased by the said commissioners, in pursuance of contracts entered into in the forms contained in the schedules marked (C.) and (D.) of this act, or from dividends of stock before purchased on the same account, shall be from time to time paid into the Bank of England, and placed to the accounts of the commissioners for the reduction of the national debt, under the same heads of account respectively as the stock in respect of which such interest and dividends arose shall be placed.

Accumulating interest in cases of additional assessment added to principal stock.

Sect. 15. "That the said commissioners for the reduction of the national debt shall from time to time cause all such interest and dividends, as shall be so placed to their account, to be invested in the purchase of the like Bank Annuities, to accumulate in the nature of compound interest in aid of the stock purchased, by payments on account of additional assessments, and for the benefit of the parties entering into the said contracts, towards the completion of the same, until such several Bank Annuities shall together yield an annuity or dividend exceeding the amount of the land-tax redeemed by one tenth part thereof; and the interest or dividends thereafter arising shall cease to be issued at the receipt of the Exchequer, or to be charged on the consolidated fund of Great Britain.

Cashiers of Bank to receive money tendered.

Sect. 16. "That the cashiers of the Bank are hereby required from time to time to receive all such monies as are hereby directed to be paid into the Bank, when tendered at the Bank; and the receipt of such cashiers, or any one of them, shall be a full and sufficient discharge to the person or persons paying such monies into the Bank as aforesaid.

Inspectors and surveyors for assessed taxes to have power to inspect land-tax assessments, &c. and take copies.

Sect. 17. "That the inspectors and surveyors for executing the several acts relating to the assessed taxes shall have power and authority, under the direction of the commissioners for the affairs of taxes, to inspect the several land-tax assessments, and the assessments to be made under the authority of this act, and all contracts, books and papers relating to the re

demption of land-tax, in the custody or possession of any person whatever; and shall have power and authority to make copies of or extracts from such assessments, books, and papers, or any of them; and the several clerks to the commissioners of land-tax or supply, and the said collectors of land-tax in Great Britain, are hereby required, on demand, to produce such books and papers to such inspectors and surveyors respectively, and to permit them to make copies of or extracts from the same, as they shall think fit.

Commissioners may contract for redemption according to assessment of preceding year.

Sect. 20. "That it shall be lawful for the commissioners for the time being acting in the execution of this act, to contract with any bodies or companies, or other persons desirous of redeeming any land-tax under the powers and provisions of this act, for the redemption of any land-tax, at any time after the 25th day of March, until the assessment of the subsequent and then current year shall be made and signed, according to the assessment of such land-tax for the preceding year; any thing in any prior act relating to the redemption and sale of the land-tax contained to the contrary notwithstanding: Provided, that, if it shall afterwards appear to the said commissioners, by the assessment of land-tax for the current year, that the amount of the land-tax charged upon the said manors, tenements, or other hereditaments, comprised in the certificate of any such contract for redemption, hath been altered, it shall be lawful for such commissioners, and they are hereby required, either to amend such contract, or to rescind the same, and to enter into a new contract for the redemption of the land-tax which shall be then charged upon the said manors, or other hereditaments, according to such terms or mode of redemption as shall be specified or referred to in the original contract.

If land-tax varied by new assessment, commissioners may amend contract, or enter into fresh contract.

If, after entering into contract for redemption, it shall appear that there is any error, commissioners may amend it, or enter into new contract.

Sect. 21. "That if the commissioners for executing the acts in force at the time of passing this act, or if at any time after the commissioners acting in the execution of the said acts and this act, shall have contracted for the redemption of any land-tax, and whether the whole of the stock or money transferrable or payable as the consideration for such redemption, shall have been transferred or paid or not, there shall appear to the said commissioners for executing this act, to be any error in the certificate of such contract, or in the description of the premises, or in the names of the parties contracting, either in the contract or in any deed of sale, mortgage, or grant of tenements or hereditaments sold, mortgaged, or granted in pursuance of the said acts, or this act, or in any entry, account, or memorial of the same, it shall be lawful for such commissioners, and they are hereby required, either to amend such contract, or to rescind the same, and to enter into a new contract for the redemption of the land-tax intended to be redeemed by such original contract; and in every such case it shall be lawful for the said commissioners either to amend any indorsement on the certificate of such contract, or where a new contract shall have been entered into, to indorse on the certificate of any such new contract,

a true copy of any receipt or receipts, or certificate or certificates, indorsed on the original certificate of the contract, whether given by any cashier or cashiers of the Bank of England, or by any Receiver or Receivers General, or collector of land-tax in England, or collector in Scotland, for the considerations, or any part thereof, that shall have been actually transferred or paid on such original contract; and it shall be lawful for the commissioners for the affairs of taxes, to make such orders and give such directions, as they shall think proper, for the transfer of stock, or the payment of money, in addition to any stock or money that may have been previously transferred or paid, or for the re-transfer of stock, or the re-payment of money in diminution of any stock transferred, or money paid, as shall be necessary to complete the instalments of stock or money, transferrable or payable on such amended or new contract, as also for the amendment of any entry, account, or memorial as shall be necessary in pursuance thereof; and the Governor and Company of the Bank of England, the commissioners for the reduction of the national debt, the several Receivers-General and collectors, to whom the same may respectively appertain, shall, upon a certificate of such error, and of the corrections thereof, or of what ought to be done for the correction thereof, signed by any three or more of the said commissioners for the affairs of taxes, and they are hereby respectively required to correct and amend such error according to the exigency of the case so certified.

Sect. 23. "And whereas some sales and conveyances have been made by bodies politic or corporate, or companies, or feoffees or trustees for charitable or other public purposes, to or in trust for other bodies politic or corporate, or companies, or feoffees, or trustees for charitable or other public purposes, of manors and other hereditaments, for the purpose of redeeming land-tax; but doubts have arisen whether such sales and conveyances are authorized by any of the acts passed for the redemption and sale of the land-tax; and it is expedient that the validity of such sales and conveyances should be established; Be it therefore further enacted, that all such sales and conveyances as have been so made as last-mentioned, shall be as valid and effectual in all respects, and the manors or other hereditaments so sold and conveyed shall be held and enjoyed by the bodies and companies, and feoffees, or trustees, to whom the same have been sold and conveyed, and by their respective successors, and heirs, and assigns, in such and in the same manner as if such bodies or companies, or feoffees, or trustees, had laboured under no legal disability to purchase and hold such manors or other hereditaments.

Sales made by one corporation to another for redeeming land-tax confirmed.

Sect. 24. "And, for obviating all doubts as to the power of bodies politic or corporate, or companies, or feoffees, or trustees for charitable or other public purposes, to sell lands to other bodies or companies, or feoffees, or trustees, for raising money for the redemption of any land-tax, under the powers and authorities of the said act of the forty-second year of his

42 G. 3, c. 116.

present majesty, or of any subsequent act passed for the redemption and sale of the land-tax, or of this act, be it enacted, that, for the purpose of raising money for the redemption of any land-tax, under such powers, or any of them, it shall be lawful for any bodies politic or corporate, or companies, and for all feoffees, or trustees for charitable or other public purposes, but nevertheless, with and under the sanction, control, direction, and authority of the commissioners for the time being acting in the execution of the said act of the forty-second year of his present majesty, and of this act, by virtue of his majesty's letters patent, to sell, dispose of and convey unto any other bodies politic or corporate, or companies, or feoffees, or trustees for charitable or other public purposes, and their respective successors, heirs, and assigns (in such manner and under such regulations, as near as may be, as are mentioned in the said act of the forty-second year of his present majesty, with respect to the sale, disposition and conveyance of lands sold by bodies or companies, or feoffees, or trustees, for the purpose of redeeming any land-tax), any of such manors, messuages, lands, tenements, or other hereditaments belonging to the bodies or companies, or feoffees, or trustees, so desirous of raising money for the redemption of any land-tax, as such bodies or companies, or feoffees, or trustees, are by the said act generally authorized to sell and dispose of for redemption of any land-tax.

Corporations enabled to sell lands to other corporations for raising money to redeem or purchase land-tax.

42 G. 3, c. 116.

Sect. 25. "That it shall be lawful for any bodies politic or corporate, or companies, or feoffees, or trustees, who shall purchase any manors or other hereditaments under the power lastly herein contained, to apply any personal property which now is or shall hereafter be invested in the public stocks or funds, or any legacies or voluntary donations, or any other trust money, which, by the said act of the forty-second year of his present majesty, such bodies and companies, and feoffees, or trustees, are authorized to lay out in the redemption of land-tax, or any surplus stock, or money arisen or to arise by any sale, mortgage, or grant, made or to be made by any such bodies, or companies, or feoffees, or trustees, for redeeming their land-tax, under the provisions of the said act of the forty-second year of his present majesty, or of any subsequent act passed for the redemption and sale of the land-tax, or of this act, in or towards the purchase of any manors, &c., that shall be sold by any other bodies, or companies, or feoffees, or trustees, under the power lastly herein contained; but where any such personal property shall be under the direction or control of any Court, the same shall be so applied under the direction, and with the approbation of such Court, to be signified by an order made upon a petition to be preferred in a summary way.

Corporate bodies enabled to lay out trust money in purchase of lands, sold by other corporate bodies, for redeeming land-tax.

42 G. 3, c. 116.

By sect. 26, sales already made of land belonging to one of two consolidated livings, for redeeming land-tax on both livings, confirmed; and similar sales authorized: In case of disunion, incumbent of living, land of which has been sold, entitled to a rent-charge.

Sect. 27. "That in all cases in which the profits of any livings are or shall be under sequestration (whether there shall or not be any incumbent thereof), or any incumbents of any livings are or shall be outlawed, it shall be lawful for the sequestrator of such living, with the consent of the college, cathedral church, bodies politic or corporate, or companies, or feoffees, or trustees for charitable or other public purposes, or other person or persons, having the patronage of such livings respectively, and with the consent of the ordinary, or it shall be lawful for such patron or patrons as aforesaid, with the consent of the ordinary, at any time during the continuance of such sequestration, or until such outlawry shall be reversed, to contract and agree, for the benefit of such living, for the redemption of the land-tax charged upon the glebe land, tithes, or other profits of any such living, and to provide for such redemption by sale or mortgage of any of the glebe lands, tithes or other hereditaments belonging to such living, or by grant of any rent-charge thereout, in such and the same manner in all respects as any incumbent of such living could or might have done under the provisions of the said act of the forty-second year of his present majesty, in case the profits of such living or livings had not been sequestered, or such incumbent or incumbents had not been outlawed.

Patrons of livings under sequestration, or where incumbent is outlawed, may redeem.

By sect. 28, patrons of livings having an alternate right of presentation, may contract for redemption of land-tax thereon not redeemed by incumbents.

By sect. 29, incumbent of a living, purchasing with his own money land-tax which has been redeemed, or purchased by prior incumbent or any other person, may raise money by sale, &c. of glebe, to re-imburse himself.

By sect. 30, assignments of land-tax already purchased by incumbents from patrons or other persons, who have redeemed land-tax charged on livings, to be registered within six months. Future assignments registered within six months from the date of contract. Stamp duty.

Sect. 31. "That, in order to provide for the purchase of any land-tax under the powers and provisions of the said act of the forty-second year of his present majesty, by any bodies politic or corporate, or companies, or any feoffees, or trustees for charitable or other public purposes, it shall be lawful for such bodies politic or corporate, or companies, or feoffees, or trustees, to sell any lands, tenements, or hereditaments belonging to such bodies politic or corporate, or companies, or feoffees, or trustees, or to mortgage the same, or to grant any rent-charge out of the same, or to enfranchise any messuages, lands, tenements, or hereditaments, which are or shall be holden by copy of court roll, or other customary tenure of any manor belonging to any such bodies politic or corporate, or companies, or feoffees, or trustees; and to sell and dispose of any heriots, or fee-farm rents, chief rents, or quit rents, or other emoluments or advantages, issuing or payable from or in respect of any freehold, or copyhold, or customary

Corporations or trustees for charity may sell or mortgage part of lands, or grant any rent-charge, &c. for purchasing land-tax.

manors or other hereditaments, or incident thereto, or accruing therefrom, in such and the same manner, and under and subject to the same directions and regulations, as such bodies politic or corporate, or companies, or feoffees, or trustees, are respectively authorized to do under the provisions of the said act of the forty-second year of his present majesty, for the purpose of providing for the redemption of any land-tax charged on the manors or other hereditaments belonging to such bodies politic or corporate, or companies, or feoffees, or trustees.

By sect. 32, incumbents of augmented livings, with consent of governors of Queen Anne's bounty, may contract for purchase of land-tax.

By sect. 33, commissioners appointed under great seal may exonerate small livings and charitable institutions, without transfer or payment of consideration.

By sect. 34, incumbents to transmit statements of income of livings, and certificates of amount of land tax; and last-mentioned commissioners may enlarge time for transmitting such statements and certificates.

By sect. 35, last-mentioned commissioners may, by writing, certify that lands are exonerated from land-tax.

By sect. 36, such certificates are to be registered gratis, and not subject to stamp-duty.

Sect. 38. " And whereas some sales have been made, and conveyances executed by bodies politic or corporate, or companies, or feoffees, or trustees for charitable or other public purposes, of tithes and other hereditaments, which have not been rated to the land-tax, for the purpose of redeeming the land-tax charged on other hereditaments; and doubts may arise as to the validity of such sales and conveyances; and it has frequently happened that certain tithes or other hereditaments belonging to livings, have not been rated to the land-tax, at the time of the contract for the redemption of the land-tax, charged on the messuages, lands, and other hereditaments, belonging to such livings respectively; and such tithes or other hereditaments so omitted to be rated, are still liable to be rated to the land-tax; and, it appears that, in some instances, certain tithes or other hereditaments belonging to livings or other ecclesiastical benefices and charitable institutions, exonerated, or intended to be exonerated, from the land-tax, by the commissioners appointed under the great seal, by virtue of the powers contained in the said acts of the forty-sixth, forty-ninth, and fiftieth years of his present majesty, were not, at the respective times of such exoneration, rated to the land-tax; and such tithes or other hereditaments not so rated, are still liable to be rated to the land-tax; Be it therefore further enacted, that, in all cases where any tithes or other hereditaments have been sold or conveyed by any body or bodies politic or corporate, or companies, or any feoffees or trustees for charitable or other public purposes as last aforesaid, the sales and conveyances thereof shall be valid and effectual to all intents and purposes whatsoever, and the tithes and

46 G. 3, c. 133, s. 2—5.
49 G. 3, c. 67, s. 1—4.
50 G. 3, c. 58, s. 1.
Sales by corporations confirmed, where tithes, &c. sold may not have been rated to land-tax. Tithes &c. discharged from land-tax,

hereditaments therein comprised, discharged from the land-tax, and all future assessments thereof, notwithstanding the tithes or other hereditaments so sold and conveyed, or any of them, may not have been, at the time of such sales or conveyances, rated to the land-tax, and the land-tax charged thereon may not have been previously redeemed or purchased; and that all such tithes and other hereditaments belonging to any livings comprised in any contract entered into for the redemption of the land-tax charged on the messuages, lands, tithes, or other hereditaments belonging to any such livings, as, at the time of the contract for the redemption of such land-tax, were not rated to the land-tax, shall nevertheless be discharged from land-tax, and all future assessments thereof; and further, that all such messuages, lands, tithes, and other hereditaments, belonging to the several livings or other ecclesiastical benefices, and charitable institutions which have been, or have been intended to be, exonerated from land-tax, under the powers and provisions contained in the said acts of the forty-sixth, forty-ninth, and fiftieth years of his present majesty, or either of them, shall be absolutely exonerated and discharged from all land-tax, from the respective periods of their exonerations, and from all future assessments of land-tax, notwithstanding certain portions or parts of the tithes or other hereditaments belonging to such livings or other ecclesiastical benefices or charitable institutions were not, at the respective periods of such exonerations, included in the rate or assessment to the land-tax.

although not rated at time of redemption.

Lands and tithes which have been exonerated from land-tax, discharged, though not rated to it at the time of exoneration.

By sect. 39, no surplus stock placed to name of Accountant-General of Chancery, until corporation interested shall have obtained certificate that land-tax has been redeemed.

Sect. 40. "That in all cases where there shall be any surplus of stock transferred as the consideration for, or purchased with the money arising by any sale, mortgage, or grant, to be made by virtue of any of the acts passed for the redemption and sale of the land-tax, or of this act, by any archbishop, bishop, rector, or vicar, or other corporation sole, for the purpose of redeeming or purchasing any land-tax (after reserving so much of such stock as shall be agreed to be transferred as the consideration for the land-tax redeemed or purchased), such surplus stock shall, if the same shall not exceed 1000*l.* capital stock three *per centum* consolidated or reduced Bank Annuities, be transferred into the joint names of such archbishop, bishop, rector, vicar, or other corporation sole, having an interest therein, and of some person to be named by such archbishop, &c., in order that the same may be applied in such manner for the benefit of such archbishop, bishop, rector, vicar, and other corporation sole, and their respective successors, as is directed by the said act of the forty-second year of his present majesty, with respect to any surplus stock not exceeding 200*l.* principal stock; and if the consideration for the redemption or purchase of such land-tax, by such archbishop, bishop, rector, or vicar, or other corporation sole, shall, in the contract, be stipulated to be

Where surplus of stock, after transferring sufficient to redeem land-tax on lands belonging to corporations sole; such stock, if not amounting to 1000*l.* to be transferred into names of such corporation and a trustee.

paid in money, the surplus of such monies, if any, after reserving the consideration for the redemption or purchase of such land-tax shall, in case such surplus shall not exceed the value of 1000*l.* of such stock as aforesaid, be paid to a trustee to be named by the archbishop, bishop, rector, vicar or other corporation sole, having an interest in such surplus, and be by such trustee laid out in the joint names of himself and such archbishop, bishop, rector, vicar or other corporation sole, in the purchase of stock to be applied in like manner for the benefit of such archbishop, bishop, rector, vicar or other corporation sole, and their respective successors.

Lay corporations to transmit to commissioners acting under great seal, account in writing of land-tax unredeemed.

Sect. 41. "That all lay corporations aggregate, and all companies, and all feoffees or trustees for charitable or other public purposes, shall, and are hereby required, within three calendar months after the passing of this act, to transmit to the commissioners for the time being acting in the execution of the said act of the forty-second year of his present majesty, and of this act, by virtue of letters patent under the great seal of Great Britain, an account in writing, specifying the amount of the land-tax which shall not then have been redeemed or contracted to have been redeemed, by or on behalf of such corporations aggregate, or companies, or feoffees or trustees respectively; and a general description of the manors and other hereditaments belonging to such corporations aggregate, or companies, or feoffees or trustees, in respect of which the land-tax shall remain charged or chargeable.

The Schedules to which this Act refers.

Schedule [A].—[A. No. 1].

FORM of the certificate of the contract for the redemption of land-tax, in cases where the consideration is proposed to be transferred in stock, pursuant to the acts in force at the time of passing this act, subject to the alterations as to the periods of transfer, provided by this act in such cases. (*Here follows the form* †.)

[A. No. 2].

FORM of the certificate of the contract for the redemption of land-tax, in cases where the consideration is proposed to be paid in money to the Receiver-General, pursuant to the acts in force at the time of passing this act, subject to the alterations provided by this act in such cases. (*Here follows the form.*)

RULES and directions applicable to the above contracts, marked [A.] No. 1, No. 2; and also to contracts marked [B.], to be observed in carrying the same into execution.

Registering contract.

1st. Every such contract, upon transfer or payment (as the case may require) of one-sixteenth part of the consideration mentioned therein, or to any greater amount, being certified by indorsement thereon as directed by the said prior acts, may, if the party or parties to the same shall choose,

† As these forms are supplied at the office, they have been omitted.

be transmitted to the commissioners entering into the same, who shall forthwith cause the same to be registered with an indorsement thereon of the time from which the land-tax shall be deemed to be exonerated conformably to the said prior acts; and after such registry and indorsement, to be transmitted to the said party or parties, or his, her, or their agent lawfully authorized to receive the same; and the land-tax shall be exonerated accordingly.

Schedule [B].

FORM of the certificate of the contract for the redemption of land-tax, in cases where the consideration is proposed to be paid in money to the Receiver-General, under the provisions of 53 Geo. 3, in any period exceeding two years, or amounting to 25*l.* or upwards. (*Here follows the form.*)

RULES and directions applicable to the above contract [B.], to be observed in carrying the same into execution, in addition to the rule annexed to schedules [A. No. 1], and [A. No. 2].

1st. The consideration upon every such contract shall, for the payment or payments to be made on or before the 25th day of March next after the making the contract, be in one sum, to be paid on or before that day, if the contract be entered into after the 29th day of September, in that year. Time of payment on contract made after 29th Sept.

2nd. Upon all contracts to be entered into before the 29th day of September in any year, the payments for the first year shall be made in two instalments, on or before the 29th day of September and the 25th day of March next ensuing the date of the contract, and the payments for the second and every subsequent year of the contract, shall be made in like manner and at the like periods. Times of payment on contracts made before 29th Sept., and in subsequent years.

3rd. The amount to be paid in the first year of the contract, shall be ascertained according to the price of stock transmitted, as is directed by the act of 42 Geo. 3, in the second week subsequent to the day of entering into the contract, and the amount to be paid in the second and every subsequent year of the contract, shall be ascertained according to the price of stock transmitted as aforesaid, in the third week after the 25th day of March preceding such payments, and conformably to the table in the schedule of the act of 42 Geo. 3, marked L., or the table in the schedule of the act of 43 Geo. 3, as the case shall require; and the two instalments for each year shall be ascertained by the same price of stock as last aforesaid. Amount ascertained.

Schedule [C].

FORM of the certificate of the contract for the redemption of land-tax, in cases where the premises consist of messuages, tenements or buildings, with the appurtenances, not including in the whole more than one-fourth part of a statute acre. (*Here follows the form.*)

RULES and directions applicable to the above contract [C], to be observed in carrying the same into execution.

Registry of contracts.

1st. Every such contract, upon payment of the whole consideration mentioned therein, being certified by indorsement thereon, as directed by the said prior acts, may, if the party or parties to the same shall choose, be transmitted to the commissioners entering into the same, who shall forthwith cause the same to be registered, with an indorsement thereon, of the time from which the land-tax shall be deemed to be exonerated, and after such registry and indorsement, to be transmitted to the said party or parties, or his, her, or their agent lawfully authorized to receive the same; and the land-tax shall be exonerated accordingly.

When land-tax exonerated.

2nd. The land-tax comprised in any such contract, whereon the consideration shall be duly paid as aforesaid, shall be deemed to be and shall be exonerated from the quarter day next after the day of entering into the said contract; and, in default of such payment, within the period limited, it shall be lawful for the commissioners entering into the same to rescind the contract, or to confirm the same conditionally, on payment of lawful interest from the day of entering into the contract to the time of such payment being made; and the certificate of the said commissioners, confirming such contract, shall be an authority to the respective Receivers-General to receive the consideration with interest as aforesaid; and the land-tax comprised in such contract shall in such case be deemed to be exonerated from the quarter day succeeding such payment.

Schedule [D].

FORM of the certificate for the contract for the redemption of land-tax, in cases where the consideration is proposed to be in money payable by way of additional assessment.

[D. No. 1].

[To be used in cases where the term of assessment is limited. (*Here follows the form*)].

[D. No. 2].

[To be used in cases where the term of assessment is to cease on the completion of the amount of stock. (*Form.*)]

RULES and provisions applicable to the above contract [D.], to be observed in carrying the same into execution.

Additional assessments made by commissioners of land-tax.

1st. Upon every contract entered into, where the consideration shall be in money payable by way of additional assessment, the payment or payments to be made in each year, as the same shall be inserted in the abstracts thereof, to be transmitted by the commissioners for executing this act, to the respective commissioners of land-tax, acting in the execution of an act

38 Geo. 3, *c.* 5.

passed in the thirty-eighth year of the reign of his present majesty, for granting an aid to his majesty by way of land-tax, shall be added to each year's assessment of land-tax in a distinct column, set opposite to the land-tax intended to be redeemed by such additional assessment: Provided

that where any contract shall be made after the land-tax assessment for that year shall have been signed and allowed, and delivered to the respective collectors, the additional assessment for that year may be made on a separate form, and annexed to the duplicate of assessment, and collected with the next payments remaining to be made of the said such land-tax.

First year's additional assessment paid before contract available.

2nd. No contract for the redemption of land-tax, by way of an additional assessment, shall be available in any respect, until the amount of the first year's additional assessment shall be fully paid to the Receiver-General for the place in England, or his deputy, or the collector of the cess for the place in Scotland, and a certificate or receipt for such payment be obtained; which every such Receiver-General or his deputy, and every such collector, is hereby required to give *gratis*, without any stamp duty.

Collectors of additional assessment.

3rd. The collectors of land-tax appointed by virtue of the said land-tax act, shall in their several parishes, places and divisions, be collectors of the said additional assessments given to them respectively in charge, without any other or further appointment than as collectors of land-tax, and the warrant for collecting the land-tax shall be a sufficient authority for them to collect the said additional assessments; Provided that all such additional assessments shall be first allowed and signed by two or more commissioners of land-tax in the division where the same shall be charged.

Powers of commissioners and collectors in relation to additional assessments.

4th. The respective commissioners acting in the execution of the said land-tax act, and the respective collectors appointed by virtue thereof, are hereby severally empowered and required to do all things necessary in relation to the additional assessments made by virtue of such contracts as last aforesaid, and of this act, in as full and ample a manner as commissioners and collectors are respectively empowered and authorized to do by virtue of the said land-tax act: and all powers, remedies, clauses, matters and things contained in the said land-tax act for demanding or receiving the said land-tax of the several persons chargeable therewith, or for levying the same from the said persons, or upon the premises charged therewith, or of paying and accounting for the monies received by virtue of the said act, shall be applied, used and exercised in the demanding and receiving the monies to arise from the said additional assessments to be made under the authority of this act from the same persons respectively, and in levying the same from the same persons, or upon the same premises respectively; and in paying and accounting for the said monies of the said additional assessments received in the same; and in as full and ample a manner as if the same powers, remedies, clauses, matters and things had been severally re-enacted in this act, and had been expressly applied to the additional assessments thereby authorized.

Tenants to deduct payments out of rent.

5th. The respective occupiers of any messuages, lands, tenements, or hereditaments charged with land-tax intended to be redeemed by way of additional assessments, and holding under the bodies, companies, or persons named in the contracts for redemption, being respectively tenants of

the same, and paying the said additional assessments on behalf of such bodies, companies, and persons respectively, shall deduct the amount thereof from the rent payable to the bodies, companies, or persons entering into the contracts for such redemption; such deductions to be made out of any rent payable after such payments; and the occupiers being respectively tenants paying the said additional assessments, shall be acquitted and discharged of so much money as if the same had actually been paid unto the bodies, companies, or persons respectively to whom such rent shall have been payable; and the several bodies, companies, and persons respectively, shall allow such deductions and payments upon receipt of the residue of the rents, under the penalty herein contained.

Not allowing deduction.

6th. If any person or persons, after entering into any contract for redemption of land-tax, by way of additional assessment, shall receive any rent liable to deduction as aforesaid, without allowing such deduction after demand thereof made, every such person shall forfeit and pay treble the amount of the rent so received, to be recovered and applied as any penalty may be recovered and applied under the said land-tax act, or under any of the acts for or in relation to the redemption of land-tax in force at the time of passing this act, and the contract shall thereupon be void; provided that the commissioners for executing this act may, if they shall be satisfied that such refusal was not wilful, or arose from mistake or error, confirm the contract, as if no such refusal had taken place.

Penalty.

Form of payment for 18 years under (D. No. 1).

7th. All land-tax contracted to be redeemed by an additional assessment in the forms of and according to the contract marked [D. No. 1.], shall be payable, and shall be assessed and paid for the term of eighteen years, computed from the commencement of the year of the date of the contract, and accounted for during the said period, as if no contract had been made for the redemption thereof; and all land-tax contracted to be redeemed by an additional assessment in the terms of and according to the contract marked [D. No. 2.], shall be payable, and shall be assessed and paid and accounted for in like manner, until the stock purchased in the 3*l. per centum* bank annuities by the monies arising from the additional assessments, and paid into the Bank of England by virtue of all such contracts entered into in each year of assessment, together with the stock to be purchased by and from the interest and dividend to arise therefrom, and hereinbefore directed to be accumulated, shall produce an interest or dividend exceeding the land-tax redeemed, by one-tenth part thereof, and until the end of the year of assessment in which such amount of stock shall be purchased.

Until completion of stock under (D. No. 2).

Contracts thereupon registered and land-tax exonerated.

8th. Upon payment of the said land-tax, and the additional assessments thereupon, for the said term of eighteen years certain, or until the amount of stock shall be purchased as aforesaid, according to the contract, the commissioners for executing this act, on the certificate of the governor of the Bank of England, that the term of redemption is expired, shall cause the contracts depending thereon to be registered and transmitted to

the respective parties, and acquittances to be indorsed thereon; and the land-tax so redeemed shall be exonerated, and all assessments thereon shall cease and determine from the expiration of the said respective periods, and the publication thereof in the London Gazette.

Payment by advance.

9th. Any body, company, or person who shall have contracted to redeem land-tax, by way of additional assessment, in pursuance of this act, may pay the whole of the consideration then remaining unpaid, and not then in assessment, in advance to the Receiver-General for the place, if in England, or his deputy, and if in Scotland, to the collector of the cess for the place there, on giving twenty-one days' previous notice in writing, at the least, to such Receiver-General in England, or to the Receiver-General at Edinburgh, if in Scotland, of such their intention, naming therein the day or days for such payment, and the annual amount of land-tax contracted for, and the date of the contract; and it shall be lawful for the Receiver-General to whom such notice shall be given, on production of a certificate of the last assessment of land-tax charged on the lands and tenements comprised in such contract, at the time of payment of the said consideration in advance, to make an allowance at the rate of 4*l. per centum per annum*, out of the sum or sums so to be paid in advance, calculated upon such sum or sums, for the period or periods by which each respective sum shall be paid sooner than the period stipulated by the said contract; and in every such case, the said Receiver-General, or his deputy, shall give the person paying the same a certificate of such payment, specifying therein the number of instalments thereby discharged, and the amount of allowance for such prompt payment, and referring to the certificate of assessment then produced; and such Receiver-General shall also transmit a copy of such certificate to the commissioners for the affairs of taxes, thereby charging himself with the amount received; and every such contract shall, on payment of the full consideration in advance as aforesaid, be forthwith registered, and the land-tax redeemed thereby shall be exonerated from the quarter day preceding the completion of such contract.

Schedule [E.]

GENERAL RULES and DIRECTIONS applicable to all beforementioned contracts for the redemption of land-tax, by payments in money in pursuance of the provisions of this act.

All money payments inserted in assessments and charged upon Receiver-General.

1st. The commissioners for executing this act, who shall have entered into any such contract, shall, as soon as conveniently can be done after the date of each contract, cause an abstract of so much thereof as shall be necessary to be transmitted to the commissioners acting in the execution of the land-tax act, in the division where the land-tax contracted for shall be charged; and the said last-mentioned commissioners shall from time to time cause assessments to be made of the payments which according to such contracts shall become due in each year ending the 25th day of

March, together with the amount of the land-tax contracted for, and the names of the contractors and occupiers of the premises whereon the land-tax is charged, in such form or forms as shall be made out at the office for taxes for that purpose; and shall annually return duplicates thereof to the Receiver-General and the king's remembrancer, in such form and manner, and at such times, as they are directed to return duplicates of land-tax, in order that the respective Receivers-General may be charged therewith, at the receipt of his majesty's Exchequer.

Payments at next receipts valid.

2nd. Every payment of money contracted to be made on or before a particular day mentioned in the contract, shall be good and valid if made to the Receiver-General or his deputy in England, or to the Collector of the cess in Scotland, upon his receipt of land-tax which shall happen next after the day of payment mentioned in the contract; and on every such payment, the Receiver-General, &c., shall give a receipt under his hand to the payer, upon which no stamp duty shall be payable.

Arrears recoverable as a debt on record.

3rd. On every default of payment within the time herein limited, the amount due or to be due upon the contract shall be recoverable as a debt on record, and process shall issue thereon by virtue of the certificate of such default, signed by the Receiver-General or his deputy, or by the collector of the cess, to whom such payment ought to have been made, and exhibited to one of the barons of his majesty's Exchequer in England and Scotland respectively; and if the same cannot be so recovered, the contract for the redemption of the land-tax shall be void, and the said land-tax, if the same has been exonerated, shall be revived, and be again payable, as if no such contract had been entered into.

Consideration paid in advance.

4th. It shall be lawful to pay to the Receiver-General in England, or collectors in Scotland respectively, the whole of the consideration then remaining unpaid in advance, according to the price of stock in the week preceding the day to be named for such payment, notwithstanding any limitation in the contract, provided the bodies, companies, or persons desirous of making any such payments in advance, shall give twenty-one days' previous notice in writing at the least, to such Receiver-General, if in England, or to the Receiver-General at Edinburgh, if in Scotland, of such their intention, naming therein the day or days for such payment; and every such Receiver-General shall, immediately upon the receipt of such notice, transmit to the commissioners for the affairs of taxes, an account of the payments so intended to be made in advance, and of the day or days on which the same are intended to be made; and if the whole of such consideration shall be so paid before the registry of the contract, or the exoneration of the land-tax comprised therein, then the said contract shall be forthwith registered, and the land-tax shall be exonerated from the quarter day preceding the said payment.

On making second and every subsequent in-

5th. Upon every contract upon which the payment of the consideration in money shall be made by instalments, except by way of additional as-

sessment, there shall be paid, at the time of making the second, and so of every subsequent instalment upon such contract, into the hands of the Receiver-General in England, or their deputies, or the collectors in Scotland, to the use of his majesty, his heirs and successors, a sum of money by way of interest, in like manner and to the like amount, in all respects, as in the said act of the forty-second year of his present majesty is directed in cases of transfer of stock or payment of money by instalments."

instalment interest paid as by 42 G. 3, c. 116, s. 29.

Stat. 57 Geo. 3, c. 100, *contains the following important enactments.*

Sect. 20. "That in all cases wherein, by reason of any purchase made or to be made of any land-tax under the powers and provisions contained in any of the acts passed for the redemption and sale of the land-tax, the lands or hereditaments, the land-tax on which has been or shall be so purchased, or any of them, have become or shall become charged with a yearly rent or sum as a fee-farm rent, equal in amount to the land-tax so purchased, and any common lands, waste lands, or other lands situate and being within the parish, township, or district within which the lands, out of which any such fee-farm rent shall be issuing, shall be situate, shall hereafter be divided or allotted and inclosed under any act of parliament already passed or hereafter to be passed, it shall be lawful for the commissioner or commissioners respectively authorized to carry such act or acts of parliament into execution, to set out or allot and award unto and and for the benefit of the bodies politic or corporate, or companies, or other person or persons for the time being seised of or entitled to the receipt of such fee-farm rents respectively, and in lieu, satisfaction, and discharge of such fee-farm rents, respectively, and to the same or the like uses as at the times of such allotments shall respectively affect the said fee-farm rents respectively, such part or parts of the lands so to be divided, allotted and inclosed as aforesaid, as the said commissioner or commissioners respectively shall in his or their judgment deem an equivalent for the fee-farm rents in lieu of which such lands shall be so allotted; such commissioner or commissioners taking care that such allotments shall adjoin or be as contiguous as may be to any other allotments, if any, to the proprietors of such fee-farm rents, or to any messuages or old inclosures, if any, belonging to such proprietors respectively.

In what cases allotments may be made under inclosure acts in lieu of fee-farm rents payable in respect of land-tax purchased.

Sect. 21. "That all and singular the powers, clauses and directions contained in an act passed in the forty-first year of his present majesty, intituled 'An Act for consolidating in One Act certain Provisions usually inserted in Acts of Inclosure, and for facilitating the Mode of proving the several Facts usually required on the passing of such Acts;' and also all and singular the powers, clauses, and directions contained in any inclosure act already passed, but the allotments under which have not been set out, and to be contained in any future acts of parliament for dividing, allotting, or inclosing any commons, waste lands, or other lands within

Provisions of 41 Geo. 3, c. 109, and all other inclosure acts applicable to allotments made under this act.

any parish, township, or places in England or Wales, shall, so far as such several powers, clauses, and directions, shall be applicable to the case, be used, applied, and exercised with respect to any allotment or allotments to be made in lieu of any fee-farm rents, under the directions of this act†.

Sect. 22. "'And whereas it appears that some deeds of sale, which, previous to the revocation of the commissions heretofore granted under the royal sign manual, enabling the persons therein named to be commissioners for the redemption and sale of the land-tax, were intended to have been executed by and under the authority of the persons named in such commissions, have been executed by the tenants for life or other persons having authority, with the consent of such commissioners, to make such sales, but have not been executed by such commissioners; and difficulties have in some instances arisen as to the mode of confirming titles under such imperfect conveyances; and it is expedient that a discretionary power should be given to the commissioners for the affairs of taxes of confirming the same, and also any deed of mortgage, or grant, that may, for the same cause, be found imperfect;' Be it therefore further enacted, that upon production to the commissioners for the affairs of taxes, or any two of them, of any deeds of sale, mortgage or grant, that have been executed by any tenant or tenants for life, or other person or persons having authority under the land-tax redemption acts for the time being, to make any such sale, mortgage or grant, with the consent and approbation of two or more of the commissioners for the time being appointed by and under the royal sign manual, but which deeds of sale, mortgage or grant, have not been executed by the commissioners, whose consent was necessary to the validity thereof, respectively, it shall be lawful for the said commissioners for the affairs of taxes, or any two of them, on their being satisfied that such deeds of sale, &c., would have been authorized and available under the powers and provisions of the said acts, or some of them, if two of the commissioners for the time being acting by virtue of the royal sign manual had been parties to and executed the same, to sign and seal such deeds of sale, &c., and to cause such indorsements to be made on such deeds respectively, as the said commissioners for the affairs of taxes may, under the circumstances of the case, think necessary or proper for shewing their assent to and confirmation of such sales, &c.; and all such deeds of sale, &c., which shall be so signed and sealed by the said commissioners for the affairs of taxes, or any two of them, and upon which any such indorsement shall be made, shall be, and the same are hereby respectively ratified and confirmed from the respective periods at which such sales, &c. were

Commissioners for the affairs of taxes enabled to execute and confirm deeds of sale, &c., which have not been executed by the commissioners acting under the royal sign manual.

Such deeds hereby confirmed.

† Of course, where a party redeems the land-tax on an estate and a right of common incident to it, an allotment made in respect of the common is exempt from the land-tax. *Boehm* v. *Wood*, 1 Turn. 334.

respectively intended to take effect, and the same shall be, from such respective periods, as valid and effectual in the law, and be considered as conferring upon the respective purchasers or mortgagees of the lands and hereditaments therein respectively comprised, or upon the respective grantees of any rent-charges, and all persons claiming by, from, through, under, or in trust for them respectively, as good a title to the lands or hereditaments sold or mortgaged, or to the rent-charges granted, as if two of the commissioners for the time being, acting under the royal sign manual, and who would have been competent under the acts for the time being to consent to such sales, &c., respectively, had approved of and consented thereto respectively, by signing and sealing such deeds respectively; and no deeds of sale, &c., so to be confirmed, shall require any stamp duty by reason of any execution thereof by the commissioners for the affairs of taxes, or by reason of any such indorsement to be made thereon as aforesaid.

Sect. 25. " 'And whereas for the purpose of redeeming or purchasing land-tax, or of raising money for reimbursing the stock or money previously transferred or paid as the consideration for redeeming land-tax, or for purchasing assignments of land-tax, or for some other purposes for which lands and hereditaments were authorized to be sold under the powers and provisions of the acts heretofore passed, relating to the redemption and sale of the land-tax, or some of them, some sales of lands and other hereditaments have been made, the titles to which, as derived under such sales, may be considered void or voidable, or liable to be impeached at law or in equity, or be liable to objections calculated to impede the free alienation thereof;' Now be it further enacted, that all sales made, and all conveyances executed, of lands or other hereditaments sold for the purpose of redeeming or purchasing land-tax, or for raising money as hereinbefore is mentioned, provided such conveyances shall appear to have been executed under the authority and with the consent and approbation of the respective commissioners for the time being authorized to consent to sales made under the powers of the said acts respectively, or any of them, shall be and the same are hereby ratified and confirmed from the respective periods at which such sales and conveyances were respectively made and executed, and the same shall be from such respective periods valid and effectual, and be considered as conferring upon the respective purchasers of the lands and hereditaments therein respectively comprised, and all persons claiming by, from, through, under, or in trust for them respectively, a good and valid title, both at law and in equity, to such lands or hereditaments, to all intents and purposes whatsoever: any thing in the said acts, or any law or custom to the contrary notwithstanding.

In what case informal sales and conveyances confirmed.

Sect. 26. " That every person who may conceive himself or herself injured or prejudiced by any sales hereby confirmed, shall, at any time within five years after the passing of this act, if such person shall not be

Proviso for relief in equity of persons injured, &c. by sales.

under any legal disability, but if he or she shall be under any legal disability, then within five years next after such disability shall be removed, be entitled to relief either by the decree of a court of equity on a bill filed, or by a summary application to a court of equity by petition, and by the usual proceedings before the master or other proper officer of the Court on such petition, and an order thereupon; and shall, under such decree or order, have an annual rent-charge to such an amount, and for and during such term or estate, and charged upon such lands or other hereditaments, as such Court shall order or direct; and the said Court shall have full power to adjust the proportion and terms of such annual rent-charge between different claimants, and to direct the settlement of such annual rent-charge in such manner as the said Court shall, under the circumstances of the case, in its discretion think proper; and shall also have power to make such order respecting the costs of the parties as the said Court shall think fit."

Several statutes have been passed in the present reign relating to the land-tax, 1 & 2 Geo. 4, c. 123; 3 Geo. 4, c. 14; 3 Geo. 4, c. 88; 4 Geo. 4, c. 68; 6 Geo. 4, c. 32; 7 & 8 Geo. 4, c. 75; 9 Geo. 4, c. 38; but they merely appoint commissioners, or rectify errors in the names of commissioners, or contain fiscal regulations not material to the present purpose.

NOT TO CARRY ON BUSINESS.

BOND *not to carry on Business within Half a Mile* (*a*) *for a certain Number of Years, nor to solicit Custom of Persons mentioned in a Schedule, under the Pain of paying Liquidated Damages.*

Obligation from one to one.

BOND from [*obligor*], of &c., to [*obligee*], of &c., in —— pounds, *ut ante*, p. 179.

Recital of co-partnership;

WHEREAS the above-bounden [*obligor*] and the above-named [*obligee*], have lately carried on the business

(*a*) A bond, &c., not to use a trade any where in England, is void; but a bond, &c., not to use a trade at a particular place, or with particular customers, is good. *Vide ante*, Vol. 1, p. 172, n. (*d*); *ante*, p. 289, n. (*a*).

of ——, in co-partnership, at —— aforesaid. AND WHEREAS the said [*obligor*] and [*obligee*] have dissolved and put an end to the said co-partnership: *And* the said [*obligor*], in consideration of the sum of —— pounds paid to him by the said [*obligee*], hath assigned to the said [*obligee*], *All* his the said [*obligor's*] share and interest in the stock in trade and effects of the said co-partnership; *And* in consideration of the further sum of —— pounds paid by the said [*obligee*] to the said [*obligor*], at or before the sealing and delivery of the above-written bond or obligation (the receipt whereof the said [*obligor*] doth hereby acknowledge), the said [*obligor*] hath agreed

dissolution;

assignment from retiring to continuing partner, of all his share;

and agreement by retiring partner not to carry on business within half a mile;

Undertaking upon the sale of the good will of a trade, not to carry on the same business, and to use the best endeavours to assist the purchaser, &c. The remedy for a breach is an action or issue, *quantum damnificatus;* and an injunction against proceeding under a judgment for the consideration upon affidavits before answer, was refused.

Where, upon the plaintiff's purchasing the good will of the defendant's business for 2,000*l.*, the plaintiff proposed that the defendant and his wife should covenant not to embark in the same line of business for ten years to come, or get any one else to do so; and to exert themselves in favour of the plaintiff; but such covenant being objected to by the defendant and his wife as unnecessary, and as an impeachment of their honour, the plaintiff relinquished it, upon the mere undertaking of the defendant and his wife. However, soon after the plaintiff filed his bill for an injunction against proceeding under a judgment for the consideration, upon affidavits, stating, in addition to the above facts, that, contrary to such undertaking, they were encouraging another person to set up in the same neighbourhood, and inducing the plaintiff's customers to leave him. Lord *Eldon* said, he did not see his way to grant an injunction in this case; observing, that if it had been nothing more than a purchase of the good-will of the trade in question, the vendor would be at liberty to set up the same trade in any other situation; against which, he added, the purchaser had the choice of several securities: he might, he said, take a covenant: which, however, was a very imperfect remedy, as it would give nothing more than an action for damages; or the parties might fix what should be the damages; putting them in the shape, not of a penalty, but of liquidated damages; in which case the remedy would be perfect. Considering the covenant proposed by the plaintiff as having been kept out by bad faith, yet, he said, if he enjoined before answer, or any default of appearance, he must give the same effect to the agreement as he should give at the hearing, if the covenant had been contained in it, upon the ground of fraud; adding, the damage occasioned to the plaintiff was to be compensated on an action against the defendant for the alleged breaches of faith. He, therefore, did not see that any thing could be done, except by an issue *quantum damnificatus*. When the answer came in, he said, the plaintiff might move again. *Shackle* v. *Baker*, 14 Ves. 468.

The only perfect remedy is liquidated damages.

NOT TO CARRY ON BUSINESS.
[*441]

that he will not, either alone or in co-partnership with any person whomsoever, carry on the said business of a* ——, within the distance of half a mile of the said house at ——, during the term of —— years, to be computed from the day of the date of the above-written bond or obligation; *And* that he will not, within the said space of —— years, solicit the custom, either for himself or any person whomsoever, of any of the persons whose names are mentioned or specified in the said schedule or inventory hereunder written; *And* that in case he shall either carry on the said trade or business within the distance of half a mile of the said house in ——, at any time during the said period of

nor solicit custom of persons mentioned in schedule;

and that in case he should, to pay liquidated damages (*b*).

Injunction restraining retired partner carrying on trade, where it was so understood but not expressed by arbitrators, on awarding the sum to be paid by the continuing partner.

On one of two partners retiring from trade, it was left to arbitrators to determine, amongst other things, what was to be paid to the retiring partner for the good-will of the trade; and they, on an understanding that the retiring partner would not set up the trade in the same street, or its vicinity, awarded 500*l.*, as the share of the retiring partner for the good-will, which was paid; but no mention was made in the award as to the retiring partner not carrying on the trade in the same street or its vicinity. Afterwards, he having set up the trade in the same street, a decree was made, on parol evidence of the understanding on which the award was made, enjoining him, on the ground of fraud, from carrying on the same trade in the same street or its vicinity. *Harrison* v. *Gardner*, 2 Madd. Rep. 198.

(*b*) DIFFERENCE BETWEEN PENALTIES AND LIQUIDATED DAMAGES.

Difference between *penalties and liquidated damages.*

In actions brought for the breach of covenants and agreements, there has sometimes been a difficulty in distinguishing between penalties and liquidated damages. The fair result of the cases seems to be this—

1. Where a sum of money, whether in the name of a *penalty* or otherwise, is introduced in a covenant or agreement, merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed or contract, and the penalty only as accessory, and therefore only to secure the damage really incurred. This rule has long been established in Courts of equity, and the statute 8 & 9 W. 3, has introduced this practice, and affords the same benefit to defendants at common law; for it is no longer now matter of election in the plaintiff to proceed under this statute: the provisions are compulsory, and must be pursued.

2. Where a deed contains covenants, or an agreement contains provisions, for the performance of several things, and then a large sum is stated at the end, to be paid upon the breach of performance, that must be considered as a penalty.

seven years; or at any time within the same period shall solicit the custom of any of the persons mentioned in the said schedule, that then, and in either of the said cases, he the said [*obligor*] shall and will forthwith repay the said sum of —— pounds to the said [*obligee*], his executors, administrators, or assigns.

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NOW THE CONDITION of the above-written bond or obligation is such, *That* if the said [*obligor*] shall and do, either alone or in co-partnership with any person or persons whomsoever, carry on the said trade or business of ——, or dealer in ——, or any of them, within

Condition that obligor shall not carry on business within half a mile;

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3. Where the payment of a smaller sum is secured by a larger. [*Aylet* v. *Dod*, 2 Atk. 239].

4. Where the word penalty is specifically used, it is merely as a security.

5. A Court of equity will relieve against a penalty upon a compensation; and a Court of law will not enforce it beyond the actual damage sustained; but where there is a covenant in a deed to pay a particular liquidated sum, neither a Court of equity nor a Court of law can make a new covenant for a man, [*Reilly* v. *Jones*, 8 J. B. Moore, 244;] nor is there any room for compensation or relief; as in leases, containing covenants for ploughing up a meadow. If the covenant be "not to plough," and there be a penalty, a Court of equity will relieve against the penalty, and direct an issue of *quantum damnificatus*. And in an action of covenant at common law, a breach must be assigned, and the extent of the injury will be the measure of damages which the plaintiff will recover. But if it be worded to pay 5*l.* an acre for every acre ploughed up, there is no alternative; no room for any relief against it; no compensation; it is the substance of the agreement. *Lowe* v. *Peers*, 4 Burr. 2229; [*Aylet* v. *Dod*, 2 Atk. 236; *Farrant* v. *Olmius*, 3 Barn. & Ald. 692].

6. Where the precise sum, therefore, is not of the essence of the agreement, the *quantum* of damages may be assessed by a jury; but where the precise sum has been fixed and agreed upon by the parties, that very sum is the ascertained and liquidated damage; the jury are confined to it, and the plaintiff cannot recover beyond it. For example, where a stipulated sum has been claimed for breach of a marriage contract, in which case it might not be possible to ascertain precisely what damages the person in respect to whom the contract is broken has sustained; and therefore the contracting parties agree to pay a stipulated sum: in such case, the sum stipulated is, by the convention of the parties, the *real* debt, and becomes due, *in integro*, on a breach of the contract.

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the distance of half a mile in any direction of the said house at ——, at any time within the space of seven years, to be computed from the day of the date of the above-written bond or obligation; Or if the said [*obligor*], either by himself or by any other person whomsoever, shall at any time within the said space of seven years solicit the custom of any of the persons whose names are specified in the schedule or inventory hereunder written, to deal either with himself, the said [*obligor*], or with any other person whomsoever in the said trade or business of ——, or any of them; Or induce or prevail upon, or attempt to * induce or prevail upon any of the said persons whose names are

nor solicit custom of any of the persons mentioned in the schedule;

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or attempt to induce any of the same persons not

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7. But in all articles containing *penalties* there are two remedies, either of which may be pursued at the option of the party injured: for, as often as the articles are broken, he may have *toties quoties*, an equitable relief, upon the articles themselves, for a partial breach of contract; or he may take the penalty. That is to say, where the penalty is contained in any other instrument than a bond, damages may be recovered against it; *Winter* v. *Trimmer*, 1 Wm. Bla. 395; *Harrison* v. *Wright*, 13 East, 342; for the plaintiff has his option to sue either for the penalty, or for the breach of contract.

If he sue for the penalty in an action of *debt*, the case is within the statute 8 & 9 W. 3, (as to which statute, *vide post*, p. 460); and if the penalty be paid, according to the stipulation of the articles, or be recovered as the debt in law, the party cannot resort back to his covenant or action for the breach of the contract; nor would he, it seems, have remedy in equity. *Ante*, Vol. 2, p. 627. But if he sue either in covenant or *assumpsit*, according as the writing which contains the penalty is under seal or not, he proceeds for damages: and it is immaterial whether he claims the penalty or not, for the jury are not bound to give that sum, but may give more or less, as they think fit; and the case is not within the statute, for in these actions, which sound in damages, the judgment is for the damages found by the jury, and no more, and cannot possibly stand as a security for future breaches. The statute is evidently confined to actions of *debt*. Even in *debt*, whenever the sum mentioned in any instrument must, from the express language of the instrument, or from necessary implication, be considered as the ascertained or liquidated damages agreed to be paid by one party to the other on the happening of a particular event, or the performance or omission of a particular act, the statute will not apply; for in such case the sum is not a penal sum; and Courts of equity will not relieve against such sum, although they will against a penalty. *Ante*, Vol. 1, p. 47, n. (*h*).

mentioned in the said schedule, not to deal, or discontinue his, her, or their dealing with the said [*obligee*]; *Then*, and in either of the said cases, if the said [*obligor*], his

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to deal with obligee;

Ponsonby v. *Adam*, 6 Bro. Parl. Cas. 418; *Goddard* v. *Vanderheyden*, 3 Wils. 270; *Harrison* v. *Wright*, 13 East, 343; *Rolfe* v. *Peterson*, 6 Bro. Parl. Cas. 470; *Sloman* v. *Walter*, 1 Bro. C. C. 418; *Hardy* v. *Martin*, Ibid. 419; *Errington* v. *Aynesly*, 2 Bro. C. C. 341; *Shackle* v. *Baker*, 14 Ves. 468; *ante*, p. 439; *Lowe* v. *Peers*, 4 Burr. 2229; *Cotterel* v. *Hook*, Doug. 101; *Bird* v. *Randall*, 1 Wm. Black. 387, and 373; *Winter* v. *Trimmer*, Ibid. 395; *Fletcher* v. *Dyche*, 2 Durnf. & East, 32; *Astley* v. *Weldon*, 2 Bos. & Pull. 346; *Smith* v. *Dickenson*, 3 Bos. & Pull. 630; *Wilbeam* v. *Ashton*, 1 Camp. 78.

Where the sum is considered as liquidated damages, and an action of covenant, or *assumpsit* is brought to recover it, it seems that the jury are bound by the agreement of the parties to give that sum.

Semble, that where it is declared that "the sum mentioned is to be considered as liquidated damages," the money is not to be considered as a penalty, but as damages ascertained.

Thus, in *Barton* v. *Glover*, Holt's *Nisi Prius* Cases, 43, in an action of *assumpsit*, the facts were as follows: the plaintiff and defendant were coach proprietors at Croydon. On the 2nd of April, 1815, they entered into an agreement, the substance of which was, that, in consideration that Barton would pay to the defendant the sum of 175*l.*; 50*l.* to be paid in money, and the residue in bills of a month from the date of the agreement, the defendant would withdraw his stage coach from the road, and not engage or concern himself in driving any other stage-coach on the road from Croydon to London. The following was the clause in the agreement on which the question arose:—

"And for the due and punctual performance of this agreement, each of the said parties to these presents does hereby agree to bind himself to the other of them in the sum of 500*l.*, to be considered and taken as liquidated damages, or sum of money forfeited or due from the one party to the other, who shall neglect or refuse to perform his part of the agreement."

The counsel for the plaintiff insisted, that he had a right to a verdict for the whole penalty in case he should shew a breach of the agreement. *Fletcher* v. *Dyche*, 2 Durnf. & East, 32.

The defendant's counsel, *contra.*—The 500*l.* is merely intended as a penalty. It is not because the parties use the term liquidated damages, that for every breach of the agreement, however slight, the whole penalty can be exacted. Penalties can seldom be enforced conscientiously; Courts of law lean against them, and Courts of equity relieve against them. He cited *Astley* v. *Weldon*, 2 Bos. & Pull. 346.

Lord Chief Justice *Gibbs* said, "There are a great many cases in which stipulated damages are contracted for, but in which neither Courts

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under pain of paying liquidated damages.

heirs, executors, or administrators, shall and do forthwith well and truly pay or cause to be paid unto the said [*obligee*], his executors, administrators, or assigns, the full sum

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of law nor equity will permit the parties to recover them. Neither of the cases cited comes up to the present. In *Astley* v. *Weldon*, there was no stipulation that the damages should be liquidated; and in that case there were several minor fines, which repudiated the idea that the whole penalty should be due for every breach. But in the present case, unless the damages are to be considered as liquidated, and definitively ascertained by the parties themselves, the clause in the agreement means nothing."

His Lordship said he would reserve the point; but the cause was afterwards referred.

[So, where A. agreed to purchase and take an assignment of certain leaseholds, with fixtures and other effects of B., and to take possession at a future day, and the agreement contained the following clause: "And lastly it is hereby agreed that all law and other expenses of carrying this agreement into effect, shall be paid by the said parties in equal moieties, and that either of them not fulfilling all and every part, the party not fulfilling shall pay unto the other the sum of 500*l.*, *hereby settled and fixed as liquidated damages*, the deposit now paid to be considered as part of the said damages, in case of default made by the said [purchaser], or returned in addition to the said damages, in case of default being made by the said [vendor]." It was held upon an action brought by B. against A. for the recovery of the balance of the 500*l.*, that the whole sum was recoverable as damages, and was not to be treated as a penalty only. The Court distinguished the case of *Astley* v. *Weldon*, on the ground that no such expression as "liquidated damages" occurred in that case. *Reilly* v. *Jones*, 1 Bing. 302, *S. C.* 8 J. B. Moore, 244.]

The word "penalty" excludes liquidated damages.

In *Smith* v. *Dickenson*, 3 Bos. & Pull. 630, the Court of Common Pleas expressed themselves clearly of opinion, that the word "penalty," used in the agreement, effectually prevented them from considering the sum mentioned as liquidated damages. Holt's *Nisi Prius* Cases, 45, n. Patteson & Williams's n. 1 Saund. 58 *a*, [c] †.

[Where the expressions are contradictory, the Court, it seems, will lean in favour of the construction which treats the sum named as a penalty only, and not as fixing the measure of the damages, such a construction being most consistent with justice. Thus, where A. agreed with B. to sell to him the stock in trade and the good-will of his business, and to demise to him his house in which the business was carried on, for which B. was to pay in the whole 970*l.* 4*s.* Of this sum, 400*l.* was paid to A. at the time of executing the agreement, and the remainder was secured by two bills of

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† As to the expression "liquidated debt" see 2 Barn. & Ald. 706.

of —— pounds of lawful money of Great Britain and Ireland, without making any deduction or abatement thereout whatsoever; the said bond or obligation shall be void and

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exchange, accepted by B., one for 400*l.*, payable twelve months after date, and the other for 170*l.* 4*s.*, payable two months after date; and A. agreed not to carry on the business within five miles of the house. And for the true performance of this agreement, each of them did thereby bind and oblige himself to the other of them "*in the penal sum of* 500*l.*, *to be recoverable for breach of the said agreement, in any court or courts of law, as and by way of liquidated damages.*" The Court held, that this sum was a penalty, and not liquidated damages: It was observed that the expressions were contradictory, the sum of 500*l.* being described in the same sentence as a "penal sum" and as "liquidated damages;" *and to hold the latter to govern the construction, imputed to the parties the absurd intention of fixing a penalty of* 500*l. upon the non-payment of a debt of* 570*l., the amount of the two bills.* *Davies* v. *Penton*, 6 Barn. & Cress. 216.

Sum cannot be recovered as liquidated damages, where instrument is not under seal.

[On a late occasion indeed, Lord C. J. *Abbott*, (now Lord *Tenterden*), is reported to have laid down the doctrine, that *where the instrument is not under seal*, the most positive agreement that the parties shall pay a given sum as liquidated damages, is inoperative. Thus, where an agreement for a lease of a public-house contained the following clause: "Lastly, it is hereby agreed, that, if either of the said parties shall neglect or refuse to comply with his part of the agreement, the party so refusing shall pay to the other of them, on demand, the sum of 100*l.*, hereby mutually agreed upon to be the damages ascertained and fixed on breach thereof." The jury in this case found a verdict for the plaintiff in 100*l.*, but the Lord Chief Justice, in summing up, remarked "a great deal has been said about the different import of the terms *penalty* and *stipulated damages;* but I am of opinion, and shall always hold so until compelled by a higher authority to say otherwise, that whether the term penalty or liquidated damages be used in the agreement, a party who claims compensation for a default, shall only be allowed to recover what damage he has really sustained. Whatever language the parties may choose to use, I am of opinion, in point of law, that a jury cannot be called upon to give more damages than the party has really sustained; *I confine my opinion to contracts not under seal;* instruments in that form may perhaps receive a different construction." *Randal* v. *Everest*, 1 Moody & Malk. 41; See *Clarke* v. *King*, 1 Ry. & Moo. 394.

[This is a very important doctrine. If it can be sustained, *Reilly* v. *Jones*, and some of the other preceding cases are wrong; for in those cases the instruments under which the stipulated sums were recovered as liquidated damages were not under seal. The very learned judge who propounded this doctrine seems on all occasions to have evinced the strong-

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of no effect; otherwise shall be and remain in full force and virtue.

Schedule.

THE SCHEDULE to which the above-written condition refers.

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est disinclination to give effect to clauses of the nature of those under consideration, as militating against moral justice; (see *Pinkerton* v. *Caslon*, 2 Barn. & Ald. 704, *ante*, p. 14); a feeling which seems quite natural in a highly honourable mind; but why a different construction is to prevail, where the instrument is under seal and where it is not under seal, it is difficult to discover. The question, in every case, is a question of intention; for it will hardly be asserted that a party is precluded by any positive rule of law from stipulating for the performance of a certain act, *or* the payment of a sum of money by another; all that can be required is, that the intention be unequivocally expressed; and if so, can the nature of the instrument make any difference? The rules of construction applicable to instruments under seal and not under seal are the same. If a clause were expressed as follows, it is apprehended that a Court could not possibly refuse to give it effect:

Suggested form of clause, providing for the payment of a sum as liquidated damages.

"And it is hereby mutually agreed, &c., that if default shall be made by the said [——] (*describe the act*), then and in such case he or they shall immediately thereupon pay to the said [*other party*], his executors or administrators, the sum of 500*l.*, not in the nature of a penalty, but as ascertained liquidated damages, which said sum of 500*l.*, when so paid, shall be in full satisfaction and discharge of all claims and demands of the said [*last named party*], his executors, administrators, or assigns, by reason or in respect of the said breach of contract."]

BY PRINCIPALS AND SURETIES TO BANKERS, FOR LIMITED AMOUNT.

BOND *from Two Principals and their Two Sureties to Four Bankers* (*a*), *for securing Sums advanced and to be advanced for the Principals, by the Firm of the Banking House for the time being, with Interest and Commission: and with a Proviso, limiting* (*b*) *the Amount of the Money to be recoverable under the Bond.*

Obligation from four to four.

BOND from [*two principals*], of &c., and [*two sureties*], of &c., to [*four bankers* (*c*)], of &c., bankers and copartners, carrying on business under the firm of "—— and company," in the penalty of 1990*l.*, *ut ante*, p. 181.

Recital that bankers have

WHEREAS the above-named [*four bankers*] have, at the special instance and request of the above-bounden [*two*

(*a*) The above form should have been inserted, *ante*, p. 232.

On bonds for securing a balance on account current, as connected with the stamp act: and whether under the stamp act the penalty be the limited sum recoverable under a bond.

(*b*) ON BONDS FOR SECURING A BALANCE ON ACCOUNT CURRENT, AS CONNECTED WITH THE STAMP ACT: AND WHETHER UNDER THE STAMP ACT THE PENALTY BE THE LIMITED SUM RECOVERABLE UNDER A BOND.

The reason for limiting the sum to be ultimately recoverable on the bond, is in order to bring it unquestionably within the specific stamp duty, for a limited sum.

In this place it may be desirable attentively to consider the stamp act, in relation to the duties imposed on bonds given as a security for monies afterwards to become due.

1st class.

After enumerating the duty on a bond given as a security for any definite and certain sum of money, not exceeding a given sum, which may be

(*c*) The obligees, and the survivors and survivor of them, and his executors or administrators, will be trustees for future partners until the bond is assigned to them.

opened an account with principals; and that the

principals], opened an account with them; and have already paid to and to their use divers sums of money. And it having been agreed, that such account shall be continued,

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called the first class, the act 55 Geo. 3, c. 184, imposes the following additional duties, which, for the purpose of distinguishing each, may be called the second and third classes.

"Bond given as a security for the repayment of any sum or sums of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be;

2nd class. "Where the total amount of the money secured, or to be ultimately recoverable thereupon, shall be uncertain and without any limit £25 0 0

3rd class. "And where the money secured, or to be ultimately recoverable thereupon, shall be limited not to exceed a given sum— } *The same duty as on a bond for a limited sum.*"

1st class. In practice, bonds for payment of a definitive sum with interest, falling under the *first class*, have the definitive sum secured, mentioned in the condition, and the penalty is generally double the amount of the sum secured, in order that the penalty may cover the interest. *Vide ante*, p. 200. *Post obit* bonds fall under the first class, although the payment be contingent: and so it seems do bonds to resign benefices, &c. *Sed vide post*, p. 456.

2nd class. If a bond has a penalty, then "the money secured, or to be ultimately recovered thereupon," is neither "uncertain," nor "without any limit;" for, both at law and in equity, the penalty is the debt, and more than the penalty cannot be recovered under the bond. *Ante*, p. 200; *Brangwin* v. *Perrot*, 2 Wm. Bla. 1190; *White* v. *Sealy*, 1 Dougl. 49; *Wilde* v. *Clarkson*, 6 Durnf. & East, 305; [*Ex parte* Rushworth, 10 Ves. 420, and see *ante*, p. 200]. Therefore, it is impossible that a bond can come under the *second class*, unless it be a bond without any express penalty; namely, a single bond generally for all such sums as might be from time to time advanced. (See the form, *post*, p. 467). Such a bond, though it would operate as a covenant, was most probably the exact kind of instrument in the contemplation of the legislature, as it would be truly and unequivocally a bond for securing an indefinite sum of money. 2 Price, 26. However, it is not improbable but that the class termed the second class was inadvertently inserted in the stamp act under the head *Bond*, as well as under the head *Mortgage*, without sufficiently attending to the different natures of the instruments. In a mortgage the value of the estate is the extent to which the security is limited: in a bond with a penalty, the amount of the penalty is the extent to which the security is limited. Probably the clause may be considered as perfectly useless in relation to a

it may happen that the said [*four bankers*], some or one of them, either alone or jointly with the persons or person who shall or may become partners or partner with them, firm for the time being may, by accepting bills, &c. ad-

bond. For instance, supposing a bond to be taken in the penalty of one hundred million pounds, or any larger sum, conditioned for the payment of all such monies as shall be thereafter lent, advanced, or paid, that is a security "for a definitive and certain sum of money:" the penalty makes it certain, because no greater sum than the penalty is secured, although only a smaller sum may be ultimately recoverable thereupon. Whether the security be a single bond, or a bond in such a large penalty as renders it almost morally certain that the amount of the penalty never can be exceeded, yet the stamp is the same, namely, 25*l.*

The *third class* contemplates an express limitation, either by the penalty, or by the condition of the bond. For if the condition be the limitation, and the penalty be larger than the limitation, the penalty is useless: and if there be no limitation by the condition, the only limit can be the penalty. 3rd class.

These conclusions are formed independently of (it seems an ill considered) determination of the Court of Exchequer, in which it was held, that the penalty is not to be considered as limiting the extent of the security, where the bond is given to secure the payment of a final balance on account current. *Scott* v. *Allsopp* and others, executors, &c. 2 Price, 20.

Bond for securing money already advanced, and to be in future advanced, in account current, (although the obligation be under a penalty in a sum certain, however less than 20,000*l.*), cannot be received in evidence, unless it bear a 20*l.*.(now 25*l.* stamp).

The facts were these: the plaintiff had been nonsuited on the trial of this cause, at the Hereford Summer Assizes, 1815, by the direction of Mr. Baron *Wood*. It was an action of debt on a bond from the defendant's testator and others, in a penalty of 4,950*l.* The condition (reciting that the obligors, who were bankers, had frequent occasion to borrow money of the plaintiff, and to negotiate bills belonging to or received from him), was, that if they or either of them should pay the plaintiff "all and every such sum or sums of money *as they now stand indebted* to the said J. B. Scott, *or which they shall or may hereafter owe or stand indebted in account current*, to the said J. B. Scott, his executors, administrators, or assigns, Then," &c.

The defendant pleaded the general issue, and *plene administravit præter* 2,000*l.* Replication joined issue, and prayed judgment as to the said 2,000*l.* Breaches suggested (under the statute) that defendant's testator, at the time of the execution of the bond, was indebted *cum aliis* to the plaintiff in 850*l.* account current; and that, after making the said bond, the testator, in his life-time, stood indebted to the plaintiff, in account current, 13,000*l.* Yet, &c.

The objection on which the nonsuit had been directed by the learned judge was, that the bond being engrossed on a 7*l.* stamp, had not been duly stamped, according to the statute 48 Geo. 3, c. 149, schedule part 1, and was not therefore a valid security, or capable of sustaining the present

vance monies for principals:

or some or one of them in the banking business; or other the persons or person for the time being constituting the firm of the said banking-house, or carrying on the business

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action. By that statute there is a provision similar to the above mentioned first and second classes, excepting that the ultimatum of the duty under that act is 20*l.*

After argument on a rule to shew cause why the nonsuit should not be set aside, and a new trial granted, Lord Chief Baron *Thompson* said, "This point depends entirely on the true construction to be put on this act of parliament, as to the several kinds of bond in the contemplation of the legislature, when it imposed these various duties on bonds of different descriptions; but of whatever description such bonds may be, the duties must be taken to be payable with reference to the time of the execution, without regard to future periods.

"The question before the Court is, what sum was payable for the duty on this particular bond at that time? This statute contemplates, in the first place, bonds intended as securities for definite and certain sums; and proceeds, by a scale, to assess the duties payable on those sums being so secured, beginning with the small sum of 1*l.* and progressively rising to 25*l.*; and, as I read the act, it has in view the sums payable by the condition of the bond, without adverting to the amount of the penalty. The next description of bond, and that which is made liable to the largest duty, is that which shall be given to secure the re-payment of money advanced, and to be advanced, upon an account current, where the total amount of the money so secured thereby, or to be ultimately recoverable thereupon, shall be uncertain and without limit. Then the third class comprehends those wherein it is expressed that the money to be secured thereby, or to be ultimately recoverable thereon, shall be limited not to exceed a given sum: then the same rate of duty is imposed on such bond as if it had been made to secure such given sum: the statute always *applying* to the money intended to be secured by the condition of the bond at the time of its execution.

"On the part of the plaintiff it has been contended, that as no more than the penalty of this bond is at any time recoverable at law, that operates as a limitation of the amount of the security, and makes it a bond securing an indefinite sum, but a sum still within the extent of the penalty. Now I cannot but consider the words in the act, where the money secured, or to be ultimately recoverable, 'shall be limited not to exceed a given sum,' as *contemplating* an express limitatation to be provided by the condition of the bond†.

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† *Sed quære, et vide ante*, p. 447. How does the statute contemplate an exclusive limitation by the condition? It is impossible; for if the security be by single bond, there is no condition. *Vide post*, p. 467.

thereof, may, by accepting and paying the bills, drafts, or promissory notes of the said [*two principals*], or by dis-

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"Then, inasmuch as the present bond was made to secure the repayment of certain money, already advanced at the time of the execution, as well as all such further sums as should be thereafter advanced by the obligors on an account current, I cannot but consider it to be a bond, whereby the total amount of the money intended to be secured, or to be ultimately recoverable thereon, was, at the time of the execution, uncertain and without limit; and that, therefore, the amount of duty payable thereon at that time was 20*l.*

"In another part of the act, bonds given as security for the transfer of shares in the public funds (which are generally given in a penalty), are made liable to a duty proportioned to the value of the stock secured to be transferred, which is to be computed according to the average price of such stock at the time of the execution of the bond. There, there is not the least reference to the penalty of such bonds, and the duty which attaches, is payable on the money advanced, with reference to the object of the condition of the bond†.

"It seems to me, therefore, that, in this case, the penalty is out of the question; and measuring the duty payable at the time of the execution of the bond, by the terms and object of the condition, the bond given in this instance required a 20*l.* stamp, and, for want of it, could not be used in support of this action. I think my brother *Wood* was right in directing a nonsuit, and that it ought to stand."

Mr. Baron *Graham* said, "The act looks to the general nature of the security, and has no reference to the penalty. Nothing is more frequent than persons, becoming security for others in an uncertain sum, guarding

† The learned Chief Baron's illustration is remarkably unfortunate, because there is not any necessity for referring to the penalty in order to ascertain the duty, for their is another criterion fixed by the legislature, namely, "the value of the stock secured according to the average price thereof on the day of the date of the bond, or on either of the ten days preceding." The value being once ascertained, such a bond is governed by precisely the same principles as a common bond under the first class. In bonds for securing the transfer of stock, there is generally a penalty of double the value of the stock, for the intermediate dividends are to be paid by the obligor; and if he do not replace the stock on the day appointed, the obligee may recover the value of the stock either on the day appointed for the transfer, or on the day of trial; *vide ante*, p. 259; which necessarily may be much more or much less than the value at the date of the bond.

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counting bills of exchange or promissory notes for them; or by affording other pecuniary assistance to them from

themselves by limiting their engagement to an express amount, and providing (if the instrument be a bond) by the condition, that as soon as so much money shall have been paid, their liability shall cease†. In that case the duty imposed by this act on such bonds, would be measured by the amount of the limitation; but where there is no such limitation so expressed, the sum secured is uncertain and without limit, and the instrument of security is subject to the highest duty. Now, I take this to be exactly such a case, and therefore, that this bond is precisely that which was meant by the act to be made liable to the largest duty. If, as soon as 1000*l.* had become due, the plaintiff had sued on the bond, and had been paid, although he could not have ultimately recovered at law more than the penalty, yet if, on the commencement of each frequent suit, he had, *toties quoties*, received so much, the bond would have, in the end, secured to him a much larger sum than the amount of the penalty; and therefore, I think that this bond should have borne the stamp to be imposed on such as are liable to the highest duty, of 20*l.*"

Baron *Graham* held, that although the obligee cannot recover, at law, more than the penalty, yet that in consequence of the bond, the obligor may voluntarily pay more than the amount of the penalty, and therefore it should have the unlimited duty.

Wood, Baron.—"On the best re-consideration that I have been able to give this case, it appears to me, that the duty on these bonds was meant to be measured by the sum intended to be secured by the condition of the bond‡. All bonds, whatever may be the penalty, are intended to secure the sum expressed in the condition, and according to the condition; and had the legislature meant to have imposed the duty on the penalty, it would have been, in most cases, imposed on double the sum actually advanced and intended to be secured.

Baron *Wood* held, that as the obligors may from time to time, in reduction of the account current, voluntarily pay larger sums than the amount of the penalty, the bond must be considered as a security for a larger amount than the penalty:

(Having read the words of the act). "The bond in question was given to secure the balance of an account current after payment, by the principal, of the money advanced at the time of its execution, and of all sums thereafter to be advanced, without limit as to the ultimate or total amount.

"I am therefore of opinion, that the condition of this bond, containing no restriction as to the total amount of the money for which it was intended to stand as a security, brings it within the description of bonds, made liable by the act to the duty of 20*l.* The money secured by it is uncertain and without limit, notwithstanding the penalty be fixed; for that does not

† The learned Baron here confounds two different kinds of securities; namely, a bond to secure a running balance to a given amount, as in the above case; and a bond to guaranty advances to a definite amount, as in *Kirby* v *Duke of Marlborough*, 2 Maule & Selw. 18; *ante*, p. 241: which case the learned Baron clearly had in his mind.

‡ *Vide ante*, p. 447.

time to time,—advance sums of money for the said [*two principals*]. And whereas the said [*four bankers*], have

that bankers have been in-

restrain the obligee from recovering ultimately on the condition, as much more than the penalty as the amount of all the sums which may have been in the mean time advanced on the faith of the bond, and repaid; for the obligors might be called on as often as the money advanced amounted to a sum somewhat less than the penalty, to pay the obligees so much; and thus, in the end, the bond might have availed them as security for 20,000*l.* or a much greater sum: and it is therefore strictly the kind of bond contemplated by the legislature as being intended to be subjected to the duty of 20*l.*

"It is said, that if the limitation had been expressed in the condition, that would have taken it out of the class of bonds subject to the largest duty; but I should have doubted whether it would not then have been liable to that duty, if it had been given to secure a *final balance* on account current; but at all events, in the present case, I am clearly of opinion, that this bond is within the act, and that therefore it could not be received in evidence for want of a proper stamp."

and upon the same principle he doubted whether, on a bond to secure a final balance on account current, the unlimited duty would not be payable, although the condition expressly limits the amount to be recoverable under the bond.

Mr. Baron *Richards* concurred; suggesting that otherwise the revenue might be constantly defrauded, by having recourse to the evasion which this sort of bond, if available, would furnish.

Rule discharged.

While the above case remains unshaken by any subsequent judicial determination, it would not be prudent in a bond to secure a limited sum, "which may become due upon an account current," to omit an express limitation in the condition of the bond. [As to the stamp duty in such a case, see *Williams* v. *Rawlinson*, 10 J. B. Moore, 362, stated *post*, Vol. 5, p. 292]. And, although the act of Parliament clearly recognizes a limited security for a final balance on account current, yet, if Mr. Baron *Wood's* conclusion be correct, there can be no such limited security. Therefore, *ex abundanti cautela*, perhaps it may be prudent, in order to avoid every doubt on this subject, to have a 25*l.* stamp on every bond for securing money which may ultimately become due upon account current.

Practical cautions.

That on a bond, no more than the penalty and costs can be recovered, whether by suggesting breaches under the statute 8 & 9 W. 3, or otherwise, is clear from the cases cited, *ante* pp. 200, 447, *et post*, p. 460, n. (*a*), where the statute is discussed at some length.

In this place the case of *White* v. *Sealey*, 1 Doug. 49, may be fully stated with advantage. There the defendants had entered into a bond, in the penal sum of 600*l.*, conditioned, *inter alia*, for the payment of a

Where there is a bond for payment of rent, &c. the bond is only

duced to open and continue account, on principals giving bond,

been induced to open and continue such account upon the above-bounden [*two principals*] entering into the above-

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a security to the amount of the penalty.

yearly rent of 570*l.* by another person. The rent being in arrear, the bond was put in suit, and judgment by default obtained against the defendant. Afterwards, another action was brought on the same bond, and a second judgment entered up. Then a third action was commenced, in bar of which the defendants pleaded the first judgment, and then obtained a rule to shew cause why the second should not be set aside with costs; and why, upon payment of the penalty and costs of the first action, the plaintiff should not acknowledge satisfaction on the record. They stated, in the affidavit on which the rule was granted, that they had not pleaded the first judgment in bar to the second action, by a mistake they had fallen into, in considering the second declaration when delivered as being the same, and in the same action with the first, and only delivered to cure a mistake in the indorsement on the other. The questions were: 1st, Whether the bond, in this case, was a standing security for all the payments of rent during the term, (which was for twenty-one years), or only to the amount of the penal sum? 2dly, Whether, upon the equity of the case, and the affidavit on the part of the plaintiff, it did not appear that it was the intention of the parties, that the sureties should be bound for the rent during the whole term, so as to entitle the plaintiff to retain the advantage he had got by the mistake of the defendant?

Mr. Justice *Buller*, at first was strongly of opinion, on the first point, (which had not been made at the bar), that, by the statute 8 & 9 W. 3, c. 11, an obligee of such a bond as this, might, from time to time, assign breaches, and recover his damages, and have execution for them, though they amounted to more than the penalty in the bond; and that the judgment would still remain as a security for all subsequent breaches.

Mr. Justice *Ashhurst* said, that would be very equitable as against the lessee, but extremely hard on the sureties, who only mean to bind themselves to the extent of the penalty.

Lord *Mansfield* said, 1. As the bond is conceived, are the defendants liable for more than the whole penalty? I think not, upon the true construction of the statute of William, the meaning of which only was, that a plaintiff should not, upon every breach, be obliged to go into a Court of equity to have issues directed of *quantum damnificatus*.

Is there any thing collateral that should make the sureties liable for more? I see nothing in the facts of the transaction which ought to have that effect. The slip in not pleading the first judgment to the second action, only affects the costs of that action, and not the merits.

Mr. Justice *Buller* then declared himself to be of the same opinion concerning the construction of the statute.

written obligation, conditioned as hereinafter mentioned: *And* upon the said [*two sureties*] joining therein as sureties for the said [*two principals*]. and sureties joining therein.

The rule was made absolute, but without costs; some circumstances appearing which satisfied the Court that the lessor was misled by the sureties with respect to the smallness of the penalty.

The Court will order satisfaction to be entered on the record in an action on a bond of indemnity, on the defendant's paying the penalty of the bond and the costs of the action.

However, in Lord *Lonsdale* v. *Church*, 2 Durnf. & East, 389, *post*, p. 465, it was held, that, in an action on a bond, damages may be recovered for more than the penalty. Mr. Justice *Buller* said, "I was not satisfied with the determination in the case of *White* v. *Sealy;* I was persuaded that many cases had been determined upon the point, though they did not occur to the Court then; and that case was not moved again, because it was the case of a surety." But in *Wilde* v. *Clarkson*, 6 Durnf. & East, 303, *post*. p. 465, Lord *Lonsdale* v. *Church*, being relied on to shew that in an action on a bond damages may be recovered beyond the amount of the penalty,—Lord *Kenyon*, in delivering his judgment, said, "I cannot accede to the doctrine in the case cited by the plaintiff's counsel; according to that, an obligor, who became bound in a penalty of 1,000*l*., conditioned to indemnify the obligee, may be called upon to pay 10,000*l*. or any larger sum, however enormous. Suppose the plaintiff proceeds in this action, and no defence is made to it, the judgment would be for the penalty of the bond, and 1*s*. nominal damages for the detention of the debt. But here the defendant is willing to pay the whole penalty and the costs of the action, and the plaintiff is not entitled to more. In actions on bonds, or on any penal sums for performance of covenants, &c., the act of Parliament (8 & 9 W. 3, c. 11, s. 8), expressly says, that there shall be judgment for the penalty; and that the judgment shall stand as a security for further breaches: but the obligor is not answerable, in the whole, beyond the amount of the penalty."

Under 8 & 9 W. 3, c. 11, judgment for the whole penalty stands as a security for further breaches; but the obligor is not answerable in the whole beyond the amount of the penalty.

In the case of *White* v. *Sealy*, and in the other cases cited *ante*, p. 447, the penalty clearly limited the sum which was recoverable under the bond; although the rent for the whole term would have been far beyond the amount of the penalty. So, the payments under the bastardy bonds, *post*, p. 465, if duly made, might have exceeded the penalty.

Indeed, it requires consideration, whether bonds of indemnity, bonds for fidelity of clerks and accountants, bonds for the resignation of benefices, &c., ought not to have the duty charged on the penalty. For the bond is given as a security for the payment of a definitive and certain sum of money, although it is uncertain whether any payment, or any payment to the extent of the penalty, will ever become due under the bond. The contingency of the payment cannot, it seems, distinguish those bonds from contingent *post obit* bonds, where the duty is always paid on the sum con-

Condition that if [principals should not pay

NOW THE CONDITION of the above-written obligation is such, that, in case [(c) the above-bounden [*two principals*], or one of them, their or one of their heirs, executors, or administrators, shall not, from time to time, and at all times hereafter (*d*), well and truly pay, or cause to be paid unto the said [*four bankers*], some or one of them, either alone or jointly with the persons or person who shall or may become partners or partner with them, or any or either of them, in the banking business; or other

[*456] * the persons or person for the time being constituting the firm of the said banking-house, or carrying on the business thereof, or their or his executors, administrators, or assigns respectively, *All* and every such sums and sum of money as already have been, or hereafter shall or may be paid or advanced; *and* all and every such sums and sum of money, to pay which a liability or engagement has been, or shall or may be entered into or incurred by them the said [*four bankers*], or any or either of them, either alone or jointly with the persons or person who shall or may become partners or partner with them, any or either of them, in the banking business; or other the persons or person for the time being constituting the firm of the said banking-house, or carrying on the business thereof, upon or by reason or means of accepting or paying the drafts, bills, or promissory notes of the said [*two principals*]; or by discounting for them other bills of exchange or promissory notes; or by affording to them other pecuniary

[*457] * assistance; *together* with lawful interest for the same monies respectively, from the time or respective times of ad-

sums advanced, and to be advanced,

with interest,

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tingently secured. However, the general practice has been (it is believed) to stamp such bonds as those above enumerated with the 1*l.* 15*s.* duty, as a bond not otherwise charged.

N. B. The last stamp act *expressly* charges a duty of 1*l.* 15*s.* on a bond for indemnifying any person who shall have become bound as surety for the payment of any sum of money or annuity, or for the transfer of any share in any of the stocks or funds. *Vide post.*

(*c*) Some gentlemen insert the part in brackets, when the principals and sureties join in the same bond; but *quære* the utility of it. This form originated in the case of a surety by a separate bond, *ut ante*, p. 237.

(*d*) *Vide post*, p. 457, n. (*e*).

vancing the same; and also commission, and all other customary charges; *Then* if] the above-bounden [*two principals and two sureties*], any or either of them, or their, any or either of their heirs, executors, or administrators, shall and do from time to time, and at all times hereafter (*e*), well and truly pay, or cause to be paid unto the said [*four bankers*], some or one of them, either alone or jointly with the persons or person who shall or may become partners or partner with them, or any or either of them, in the banking business; or other the persons or person for the time being constituting the firm of the said banking-house, or carrying on the business thereof, or their or his executors, administrators, or assigns respectively, *All* and every such sums and sum of money as already have been, or hereafter shall or may be paid or advanced; *and* all and every such sums and sum of money, to pay which a liability or engagement has been, or shall or may be entered into, or incurred by them the said [*four bankers*], or any or either of them, either alone, or jointly with the persons or person who shall or may become partners or partner with them, any or either of them, in the banking business; or other the persons or person for the time being constituting the firm of the said banking-house, or carrying on the business thereof, upon or by reason or means of accepting or paying the drafts, bills, or promissory notes of the said [*two principals*]; or by discounting for them other bills of exchange or promissory notes; or by affording to them other pecuniary assistance; *together* with lawful interest for the same monies, respectively, from the time or respect- [* 458] *ive times of advancing the same; and also commission, and all other customary charges; *Then* the above-written obligation to be void, otherwise to be and remain in full force and virtue. PROVIDED, *and it is hereby declared*, that the money to be ultimately recoverable upon this bond shall be, and the same is limited not to exceed the

and commission; *Then* if] principals and sureties, or any or either of them should pay

sums advanced and to be advanced,

with interest,

and commission;

then bond to be void.

Proviso, that only a given sum shall be recoverable.

(*e*) The words "*on demand*," are sometimes inserted here; but they should be invariably omitted. For if either of the obligors should become bankrupt before demand, the debt, so far as it is created by this bond, could not be proved under the commission. *Vide ante*, pp. 261, 262, 271.

No proof under a bond, unless forfeited before bankruptcy.

sum of one thousand nine hundred and ninety pounds of lawful money of Great Britain (*f*).

Attestation.

SEALED AND DELIVERED by the above-named [*principals and sureties*], (being first duly stamped), in the presence of

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(*f*) In some instances a similar addition to the following has been added to a surety bond: but see the observations at the end.

Proviso, that if sureties should pay the sum secured, and more monies should be due to bankers, then all such dividends as they shall receive shall be applied in the first place to pay such further sum.

"PROVIDED ALSO, that in the event of the said [*two sureties*], as such sureties as aforesaid, or either of them, their, or either of their heirs, executors, or administrators, actually paying the said sum of one thousand nine hundred and ninety pounds, or any other sum or sums of money under or by virtue of the above-written obligation, and of there being further monies over and above the said sum of one thousand nine hundred and ninety pounds due or owing from the said [*principals*] to the said [*four bankers*], or to any three, two, or one of them, or to them, or any three, two, or one of them jointly with any other persons or person who shall or may become partners or partner with them, or any three, two, or one of them, or to other the persons or person constituting the firm of the said banking-house for the time being; then, and in such case, all such dividends and monies as shall have been or shall be received by them on the whole monies for the time being owing to them from the said [*principals*], shall be applied in the first place in or towards satisfaction of such further monies so due or owing as aforesaid; *And* the said [*two sureties*], or either of them, their, or either of their heirs, executors, administrators, or assigns, shall not be entitled to receive any such dividend or dividends, or sum or sums of money, or any part thereof, until such further monies shall be fully paid or satisfied."

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In a case where the penalty was of the same amount as the sum limited to be recovereable under the bond, and a proviso similar to the preceding was inserted, on a question respecting the validity of the bond as affected by the stamp act, and on a request generally to advise on the bond, the following opinion was given.

"There is apparently great inconsistency in this bond: for it limits the whole amount of monies to be ultimately recovered by virtue thereof to the sum of 1990*l.*; and then states, that in case the sureties should pay the whole sum of 1990*l.*, or any less sum, and there should be a further sum than 1990*l.* due to the obligees, all such dividends as they shall receive shall be applied in the first place to discharge the further sum. Now, if the principal should become bankrupt, *non constat* but that his estate may pay twenty shillings in the pound, and then the money secured by the bond to the obligees would amount to 3,980*l.*

"There is a possibility, that the obligees may receive a dividend through the *laches* of the sureties who pay them the money, although the sureties are, under the 49 Geo. 3, c. 121, s. 8, entitled to the dividends; *Ex parte Brook*, 2 Rose, 334; and may even, notwithstanding this proviso, receive them in defiance of the obligees. For the proviso extends only to such dividends as shall be received by the obligees. But, on account of the possibility of receipt of those dividends (supposing the subsequent proviso would not be held to be void for repugnancy, which I do not think would be the case, for the reasons hereafter mentioned), I am of opinion, that if the bond has been stamped with the 6*l.* duty, it has not been properly stamped. It should be stamped with the 8*l.* duty.

"I recommend the total omission of the last clause, or that the amount to be secured or recovered should be double the amount of the sum for which the sureties are bound. And that it be provided that the dividends, whether received by the obligees or by the sureties, should be applied towards satisfying any further sum.

"It is observable, that in the above proviso limiting the amount, the word 'recovered' only is used, which *primâ facie* may not seem to extend to monies received, to which the sureties would be entitled, but which by the proviso the obligees are authorized to *retain*. But I think that is a distinction which cannot be relied on, so far as the bond is a *security*, within the meaning of the stamp act. However, if the bond were properly stamped, I think that no objection on account of the penalty would arise to prevent the obligees *retaining* any dividends they may receive. For I think the proviso extends the security as limited by the penalty and by the condition."

TO BANKERS FOR LIMITED CURRENT BALANCE.

BOND (*a*) *from a Tradesman and his two Sureties to Bankers, to secure to the Firm of the Banking-House for the Time being, such Balance as may become due on Account current* (*b*) *with the Principal, or with him and any Partner, or Partners: with a Proviso, limiting the Amount of the Money to be recovered under the Bond; but the Bond to be a Continuing Security to that Amount.*

Obligation from three to two, or more.

BOND from [*principal*], of &c., and [*two sureties*], of &c., jointly and severally, to [*obligees*], of &c., in the penal sum of —— pounds, *ut ante*, p. 179.

Recital of carrying on business:

WHEREAS the above-named [*obligees*] carry on the business of bankers in copartnership. AND WHEREAS the above-bounden [*principal*] now carries on the business of

(*a*) The above bond was lately settled by one of the learned judges of Westminster Hall, for a friend of his, a banker in the country.

(*b*) Formerly, in an action of debt on bond for performance of covenants, &c., the plaintiff not only had *judgment* to recover the penalty of the bond together with his costs, but was also entitled to take out *execution* for the *whole*, without any regard to the damage which he had actually sustained by the breach of covenant. *Gainsford* v. *Griffith*, 1 Saund. 58, (1). But, "for the relief of his majesty's subjects against causeless and unjust suits, and for the better enabling them to recover their just rights," by statute 8 & 9 W. 3, c. 11, s. 8; "In all actions in any Court of record upon any bond, or on any penal sum for non-performance of any covenants or agreements contained in any indenture, deed, or writing†, the plaintiff *may* assign as many breaches as he shall think fit; and the

In actions on bonds, or on penal sum, plaintiff may assign as many breaches as he pleases:

[† The instrument stated, *ante*, Vol. 2, p. 348, in the case of *Hurst* v. *Jennings*, 5 Barn. & Cress. 650, was held to be a bond for the performance of covenants, within this clause of the statute.]

TO BANKERS, FOR LIMITED CURRENT BALANCE.

[——], And whereas the said [*principal*] hath requested the said [*obligees*] to accept and discount notes, drafts, and bills of exchange, for him the said [*principal*]; and also to advance and lend him such sum and sums of money as he may require for his convenience and accommodation, in order to enable him to carry on the said business; and also to keep a cash or running account with him the said [*principal*]; which they the said [*obligees*] have agreed to do, upon having the balance of the said cash or running account for the time being, which shall or may at any one time hereafter become due and owing from the said [*principal*], or any person or persons with whom he may hereafter enter into partnership, to them the said [*obligees*], or other the persons or person for the time being carrying

that principal hath requested bankers to open an account with him:

which they have agreed to do, on having running balance secured by the bond of principal and sureties;

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jury shall assess not only such damages and costs as have heretofore been usually done, but also damages for such of the breaches as the plaintiff, upon the trial of the issues, shall prove to have been broken; and the *like judgment* shall be entered on such verdict as heretofore has been usually done. And if judgment shall be given for the plaintiff on demurrer, or by confession, or *nil dicit*, the plaintiff *may* suggest upon the roll as many breaches as he shall think fit; upon which a writ shall issue to the sheriff of the county where the action is brought, to summon a jury before the justices of assize of that county, to inquire of the truth of those breaches, and to assess the damages; in which writ the said justices of assize shall be commanded to make return thereof to the Court from which the same shall issue, at the time mentioned in such writ. And in case the defendant, after such judgment, and before execution, shall pay into Court to the use of the plaintiff the damages assessed, and costs, a stay of execution shall be entered upon the record; or if, by reason of an execution, the plaintiff shall be fully paid all the damages and costs, and the charges of the execution, the defendant's body, lands, or goods shall be thereupon forthwith discharged from the execution, which shall likewise be entered upon record; but in each case *the judgment shall* notwithstanding *remain as a further security*, to answer to the plaintiff such damages as he may sustain by any further breach of covenant contained in the same indenture, deed, or writing; upon which the plaintiff may have a *scire facias* upon the said judgment against the defendant, his heirs, terretenants, or executors or administrators, suggesting other breaches of the said covenants or agreements, and to summon him or them respectively to shew cause why execution should not be awarded upon the said judgment, upon which there shall be the like proceeding as was in the action of debt upon the said bond, for assessing of damages upon trial of issues joined upon such

and jury may assess damages.

Defendant paying damages, execution may be stayed;

but judgment to remain, to answer any further breach, and plaintiff may have a *scire facias* against the defendant.

TO BANKERS, FOR LIMITED CURRENT BALANCE.

on the said business, now carried on under the firm of ——, for or by reason or means of any drafts, notes, or bills of exchange, to be drawn or discounted upon, with, or by them the said [*obligees*], or such other persons or person as aforesaid; or by reason or means of any monies to be advanced on the said cash account; or by reason or means of any transactions, matter, or thing whatsoever to be had between the said [*principal*] and the said [*obligees*], or such other persons or person as aforesaid, secured to be paid to them the said [*obligees*], their executors, administrators, and assigns, or such persons or person as aforesaid, by the joint and several bond of the said [*principal*], and of the said [*two sureties*], as his sureties, in the penal sum of —— pounds; *So, nevertheless,* that no greater

but the extent of the security to be limited.

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breaches, or inquiry thereof upon a writ to be awarded in manner aforesaid, and upon payment or satisfaction as aforesaid of such future damages, costs, and charges as aforesaid, all further proceedings on the judgment are again to be stayed, and so *toties quoties*, and the defendant's body, land, or goods shall be discharged out of execution as aforesaid."

To what instruments the statute extends.

This statute was meant to meet the case of non-performance of covenants and agreements secured by bonds or indentures, and which covenants are to be performed at different times, or the monies paid by instalments; and extends as well to bonds with conditions thereunder written for the performance of any thing contained therein (for the condition of the bond is an agreement in writing), and to penalties on articles of agreement, or the like, for the non-performance of covenants or agreements contained in the same articles, &c., as to covenants and agreements contained in another indenture, deed, or writing. *Collins* v. *Collins*, 2 Burr. 824, 826.

What bonds are, and what not, within the statute.

A bond conditioned for the payment of an annutty; *Collins* v. *Collins*, 2 Burr. 820; *Roles* v. *Rosewell*, 5 Durnf. & East, 538; *Hardy* v. *Bern*, Ibid. 540, 636; *Walcot* v. *Goulding*, 8 Durnf. & East, 126; *ante*, Vol. 2, p. 289; or of money by instalments; *Willoughby* v. *Swinton*, 6 East, 550, *S. C.* 2 Smith, 663; or a bond conditioned to perform an award; *Welsh* v. *Ireland*, 6 East, 613, *S. C.* 2 Smith, 666; is within the statute. But the provisions of the statute do not extend to *post obit* bonds; *Wardell* v. *Fermor*, 2 Campb. 285, n. *Cardozo* v. *Hardy*, 2 J. B. Moore, 220; or other bonds conditioned for the payment of money, which are provided for by the statute 4 Ann. c. 16; nor to bail, *Selby* v. *Serres*, 1 Tidd, 604; *Moody* v. *Pheasant*, 2 Bos. & Pull. 446; or replevin-bonds; *Middleton* v. *Bryan*, 3 Maule & Selw. 155; nor, as it seems, to bonds given to the Lord Chancellor by the petitioning creditor for a commission of bankrupt, under the statute 5 Geo. 2, c. 30, s. 23; *Smith* v. *Broom-*

sum be ultimately recoverable on the said bond; nor the said [*principal*] and [*sureties*], any or either of them, their, any, or either of their heirs, executors or administrators, be liable to pay more by virtue thereof than the sum of —— pounds.

TO BANKERS, FOR LIMITED CURRENT BALANCE.

NOW THE CONDITION of the above-written bond or obligation is such, that, if the above-bounden [*principal*] and [*sureties*], or either of them, their, or either of their heirs, executors, or administrators, shall and do, on demand (*c*), well and truly pay or cause to be paid unto the said [*obligees*], or any of them, or their, or any of their executors or administrators, or other the persons or person for the time being carrying on the business now carried on

Condition for payment of all such sums as shall be due to the firm for the time being,

head, 7 Durnf. & East, 304-5; *Smithey* v. *Edmonson*, 3 East, 22: for, in the two former cases, the Court can relieve the defendant without his being compelled to file a bill in equity; and in the latter, the Chancellor is expressly empowered to assess the damages by 5 Geo. 2, c. 30, s. 23. Neither does it extend to common money bonds, against the penalty of which the Courts can give relief by statute 4 Ann. c. 16, s. 13; *Murray* v. *Earl of Stair*, T. 4 Geo. 4, K. B. cited Patteson & Wms.'s n. 1 Saund. 58, [*a*] [now reported 2 Barn. & Cress. 82, *S. C.* 3 Dowl. & Ryl. 278.] And where judgment is entered up on a warrant of attorney for securing money by instalments, it is not within the statute, although a bond be also given. *Austerbury* v. *Morgan*, 2 Taunt. 195; *Cox* v. *Rodbard*, 3 Taunt. 74; *Kinnersley* v. *Mussen*, 5 Taunt. 264: *et vide ante*, Vol. 2, pp. 289, 290.

It is now held, notwithstanding some cases to the contrary; *Walker* v. *Priestly*, Com. Rep. 376; *Dry* v. *Bond*, Bull. Ni. Pri. 164; *Paul* v. *Rogers*, 5 Durnf. & East, 541, n. (*b*); that the words "*may assign*," in the first part, and "*may suggest*," in the subsequent part of the statute, are compulsory upon the plaintiff. For the act was made in favour of defendants, and is a remedial law, calculated to give plaintiffs relief up to the extent of the damages sustained, and to protect defendants against the payments of further sums than are in conscience due; and also to take away the necessity of proceedings in equity to obtain relief against an unconscientious demand of the whole penalty, in cases where small damages only have accrued. 5 Durnf. & East, 637. And therefore it is not in the plaintiff's power to refuse to proceed according to the statute, but he *must* assign the breach of such covenants as he proceeds to recover satisfaction for; and if the defendant plead to issue, the jury upon the trial

The plaintiff must assign breaches under the statute.

(*c*) *Vide ante*, p. 457, n. (*e*).

TO BANKERS, FOR LIMITED CURRENT BALANCE.

under the firm of ——, *All* such sum and sums of money which shall or may at any time be due and owing to the said [*obligees*], or any of them, their, or any of their executors or administrators, or other the person or persons for the time being carrying on the business now carried on under the firm of ——, for or by reason or means of any drafts, notes, or bills of exchange, drawn or discounted upon, with, or by them the said [*obligees*], or any of them, or their, or any of their executors or administrators, or such other person or persons as aforesaid, by or for, or on account of, the said [*principal*], his executors or administrators; or by, for, or on account of the said [*principal*], and any other person or persons with whom he may enter into partnership, or be concerned in trade with, or for money

on account of principal; or on his, and his partner's account:

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must assess damages for such of the breaches assigned as the plaintiff shall prove to have been broken; otherwise the verdict is erroneous, and a *venire de novo* will be awarded. So it is where there is a judgment upon demurrer or by default. *Hardy* v. *Bern*, 5 Durnf. & East, 636; *Roles* v. *Rosewell*, Ibid. 538; *Drage* v. *Brand*, 2 Wils. 377; *Goodwin* v. *Crowle*, Cowp. 359. Before this act, a plaintiff could only assign *one breach* upon a bond or penal sum for the performance of covenants; for, if he assigned several breaches, the declaration was bad for *duplicity*, because the bond was forfeited by the breach of one covenant as much as of several covenants; but, in an action of *covenant* he may assign breaches upon every one of the covenants. *Manser's* case, 2 Co. 4 a.

Payment of penalty into Court discharges defendant from further liability.

If the defendant had paid the whole debt, that is, the penalty of the bond, he might have pleaded the payment in bar of the demand before the statute. 2 Burr. 824. And upon this principle, since the statute, it was held, in *White* v. *Sealy*, Doug. 49, which was a bond conditioned for payment of rent, that the bond was only a security to the amount of the penalty; and therefore the Court ordered, that, upon payment by the obligor of the penalty and costs into Court, the plaintiff should acknowledge satisfaction on the record. *Vide ante*, p. 453. So, in *Brangwin* v. *Perrot*, 2 Wm. Bla. 1190, which was a bond to indemnify a parish against a bastard child, the Court made a like order, that, upon payment of the penalty and costs into Court, the defendant should be relieved from the bond. And in *Wilde* v. *Clarkson*, 6 Durnf. & East, 303, which was also a bond to indemnify a parish against a bastard child, the Court ordered, that, upon payment of the penalty and costs into Court, satisfaction should be entered on the record; and *Lord Lonsdale* v. *Church*, 2 Durnf. & East, 388, was denied. *That* was a bond conditioned to account to the plaintiff for all sums of money received by the defendant as receiver of the harbour-

TO BANKERS, FOR LIMITED CURRENT BALANCE.

lent and advanced, paid or discharged by the said [*obligees*], or any of them, their, or any of their executors or administrators, or other such persons or person for the time being carrying on the said business now carried on under the said firm of ——, to, for, or on the account, or for the use of the said [*principal*], his executors or administrators, or for him and any person or persons with whom he may hereafter enter into partnership, or be concerned in trade, or in which he, his executors or administrators, or other the person or persons last aforesaid shall, by means of an account stated, or in any other manner whatsoever, become indebted to the said [*obligees*], or any of them, or their, or any of their executors or administrators, or the persons *or person for the time being carrying on the trade now carried on under the said firm of ——. And shall and do

[*466] with interest thereon.

dues of Whitehaven; and it was held, that damages might be recovered for more than the amount of the penalty, and therefore the Court refused to stay the proceedings upon payment of the penalty into Court. It seems clear, however, that, both at law and in equity, the obligee cannot recover more damages against the obligor for a breach of the condition of the bond, than the amount of the penalty and costs; for the bond ascertains the extent of the damage by consent of the parties; if, therefore, the defendant pays the plaintiff the whole stated damages, he cannot desire any more. Therefore, if a bond be conditioned for performance of any act, and the obligee, by reason of the obligor's non-performance, sustains a damage far exceeding the amount of the penalty, yet he can only recover to the extent of the penalty and costs. 6 Durnf. & East, 304; *Clarke* v. *Seton*, 6 Ves. 414, 415. But in an action on a judgment on a bond, interest may be recovered in damages beyond the penalty of the bond. *M'Clure* v. *Dunkin*, 1 East, 436. See further, *ante*, p. 201; Vol. 2, p. 289. As the penalty is still the debt, notwithstanding this statute, therefore, where a defendant is arrested for a sum less than the penalty, although greater than the damages assessed by the jury, he is not entitled to costs under the statute 43 Geo. 3, c. 46, s. 3. *Cammack* v. *Gregory*, 10 East, 525; *Talbot* v. *Hodson*, 7 Taunt. 254; 2 Marsh, 527, *S. C.* But it seems that he may maintain an action for a malicious arrest. 1 Saund. 58 *c*, [*e*].

For an account of the proceedings under this statute, see 1 Tidd, 604, 2 Tidd, 715, 7th ed. Wms. n. 1 Saund. 58, (1); 2 Saund. 187, (2), and Patteson and Wms's notes to the 5th ed.; to which edition the copious index to the valuable notes is a great improvement. [See also *Johnes* v. *Johnes*, 3 Dow, 1.]

TO BANKERS, FOR LIMITED CURRENT BALANCE.

well and truly pay, or cause to be paid to the persons or person entitled thereto, interest for such sum and sums of money as aforesaid, at and after the rate of five pounds for every one hundred pounds for a year, to be computed from the time or respective times of advancing, paying, or disbursing the same respectively, or of the same becoming due: And also the lawful and usual commission, charge, and expenses incident or occasioned by the transactions aforesaid, or any of them, whether such payments, advancements, or disbursements, shall be by cash, notes, drafts, bills of exchange, or otherwise howsoever, or in whatever manner, or on whatever account the said debts shall become due; *Then* the above-written bond or obligation shall be void and of no effect; otherwise the same shall be and remain in full force and virtue. Provided always, *and it is hereby declared and agreed*, that the sum of money to be ultimately recovered on this bond shall be, and is hereby limited not to exceed the sum of —— pounds: And that the said [*principal*] and [*sureties*], or either of them, their, or either of their heirs, executors, or administrators, shall not be liable to pay, by virtue thereof, any greater sum than the said sum of —— pounds: But that this bond shall be a continuing security to that amount for the sums from time to time owing as aforesaid.

and commission, &c.

Proviso limiting the amount of the money to be recovered under the bond;

but the bond to be a continuing security to that amount.

A SINGLE BOND *or* BILL (*a*), *where the total Amount of the Money secured, or to be ultimately recoverable thereupon, is uncertain, and without any Limit.*

SINGLE BOND FOR UNLIMITED SUM.

KNOW ALL MEN BY THESE PRESENTS, *That* I [*obligor*], of &c., am held and firmly bound to [*obligee*], of &c., Single bill from one to one, to secure monies ad-

(*a*) Lord *Coke* says, a *bill* is a single bond, without condition. Co. Litt. 172 a. Lord Chief Baron *Comyns* says, a single bill is, when a man is bound to another by bill or note without a penalty. Com. Dig. *Obligation* (C). A single bond has neither condition nor penalty.

Obligation is a word in its own nature of a large extent; but it is commonly taken in the common law for a bond containing a penalty, with a condition for payment of money, or to do or suffer some act or thing, &c. Co. Litt. 172 a. An obligation is a bond with a penalty and condition.

In addition to the necessity of a single bond to meet the provision of the last stamp act; *vide ante*, p. 447, *second class;* by a single bond, an infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himself afterwards. Mareh. 145; 1 Roll. Abr. 729, pl. 7; *Russell* v. *Lee*, 1 Lev. 86. But, if an infant bind himself in an obligation or other writing, with a penalty, for the payment of any of those things, that obligation shall not bind him. Co. Litt. 172 a, and Hargr. n. (2); 1 Roll. Abr. 729, pl. 8; Noy's Max. 39; *Fisher* v. *Mowbray*, 8 East, 330. By a single bond an infant may bind himself to pay for necessaries; but not by an obligation, because it has a penalty.

With respect to the necessaries for which an infant may contract a debt, the question always bears a reference to the condition of the parties. Necessaries do not consist simply in any absolute thing; as in food, clothes, or lodging; but in any article which may correspond with the condition and circumstances of the infant. [Even clothes are not necessaries if the infant is supplied with them by his parent. *Cooke* v. *Deaton*, 3 Car. & Pay. 114]. The necessaries for which an infant may contract.

It has been determined that an infant, a captain in the army, is liable to pay for a livery ordered for his servant, as necessaries, but not for cockades ordered for the soldiers of his company. *Hands* v. *Slaney*, 8 Durnf. & East, 578. Necessaries for an infant's wife are necessaries for him, but

vanced to any amount.

banker, in *All* and every such sums and sum of money as already have been, or hereafter shall or may be, paid or ad-

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not if provided in order for the marriage. *Turner* v. *Trisby*, Str. 168. Money advanced to release an infant taken in *execution*, may be recovered as necessaries. *Clarke* v. *Leslie*, 5 Esp. 28, per *Alvanley*, C. J., 1803. But, if the infant were in custody upon mesne process, it must be shewn that the debt for which the arrest was made was for necessaries. Regimentals sold to a member of a volunteer corps are necessaries, *per Ellenborough*, C. J., in *Coates* v. *Wilson*, 5 Esp. 152. So, it seems, money advanced at the request of an infant to a parish officer, to free the infant from supporting his bastard child, is a necessary for which an infant may give a single bill. *Fisher* v. *Mowbray*, 8 East, 330. The question of necessaries is to be governed by the real circumstances of the infant, and not by his ostensible situation. *Ford* v. *Fothergill*, Peake, 229. But the Court shall judge what things are necessary. Cro. Eliz. 583.

An infant is not liable for money lent, except it be applied in payment of a just debt.

An infant, however, is not liable for money lent, though laid out in the purchase of necessaries. *Robart* v. *Knouth*, 2 Esp. 472, n. *per Buller*, J. 1783. See likewise 1 Salk. 279; Com. Dig. *Enfant*, (C 2). But, if one lends money to an infant to pay a debt, and if, in consequence of such loan, he does pay the debt, the infant shall be liable in equity; for the lender of the money stands in the place of the person paid, viz. the creditor for necessaries, and shall recover in equity, as the creditor would have recovered at common law. So, if one borrows money during infancy, and applies it to the buying of necessaries, and afterwards, coming of age, devises his lands for payment of his debts; this debt, contracted during infancy, is within the trust. *Marlow* v. *Pitfield*, 1 P. Wms. 559. [As to promises by adults to pay debts contracted during infancy, *vide ante*, Vol. 1, pp. 329 *b*, 329 *g*, 2nd ed.]

An infant, it seems, can only bind himself by single bill.

An infant cannot accept a bill of exchange for necessaries. *Williamson* v. *Watts*, 1 Camp. 552. See likewise 1 Carth. 160; Com. Dig. *Enfant*, (C 2.) It has been thought, however, that he might bind himself by a promissory note for necessaries, by analogy to the ancient doctrine, that a single bill given by an infant for necessaries was binding. But there is a material distinction between a *single* bill and a promissory note; that the former was not negotiable; whilst promissory notes, since the statute of Anne, are upon the same footing as bills of exchange. As a promissory note, therefore, might be indorsed over, it seems that an infant would not be bound by such security, at least not whilst it is in the hands of an indorsee; and in the hands of the person to whom it was originally made payable, it would probably be deemed to have no other qualities than a promissory note had before the statute of Anne, that of being *evidence* of a debt.

Assumpsit on an account stated does not lie against an infant, even

SINGLE BOND FOR UNLIMITED SUM.

vanced; *And* all and every such sums and sum of money, to pay which a liability or engagement has been, or shall or may be entered into, or incurred by him the said [*obligee*], upon or by reason or means of accepting or paying the drafts, bills, or promissory notes of the said [*obligor*]; or by discounting for him other bills of exchange or promissory notes, or by affording to him other pecuniary assistance; *together* with lawful interest (*b*) for the same monies respectively, from the time, or respective times of advancing the same; and also commission, and all other customary charges, to be paid to the said [*obligee*], or to his certain attorney, executors, administrators, or assigns: *For* which payment to be well and truly made, I bind myself, my heirs, executors, and administrators, and every of them, firmly by these presents; *Sealed* with my seal: DATED this —— day of ——, [in the —— year of the reign of our sovereign Lord *George* the *Fourth*, by the grace of God of the united kingdom of Great Britain and

Testimonium.

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though the particulars of the account were for necessaries. *Trueman* v. *Hurst*, 1 Durnf. & East, 40.

The defence of infancy is not to be used as a sword, but as a shield—the law seeks only to protect the infant from the effects of imprudence. Holt's *Nisi Prius* Cases, 78, n.

For other forms of single bonds, see West's Simboleography, *part. primæ, liber secundus*, sec. 101, edit. 1605; 1 Scrivener's Guide, 305, 5th ed.

Interest is not always recoverable on a single bond:

(*b*) Lord *Holt* said, that upon a single bill, of a distant time, interest may be recovered in damages: Mod. Cas. 167: though payable upon demand, and no demand proved, where the defendant pleads *non est factum*. Ibid. However, in *Hogan* v *Page*, 1 Bos. & Pull. 337, in an action of debt on a single bond, proceedings were stayed by the Court of Common Pleas, on payment by the obligor of principal and costs, without interest.

never on infant's security.

But an infant can give no security to bind himself for the payment of interest. *Fisher* v. *Mowbray*, 8 East, 330.

Bond in penalty without any day of payment, is payable immediately, and interest may be recovered though not reserved.

But a bond in a penal sum, conditioned for payment of a lesser sum generally, without naming any day of payment, becomes a present debt: therefore, as the principal becomes payable on the day of the date of the bond, interest is payable on such a bond from the date, though not expressly reserved: and upon any action brought upon the bond, the Court will refer it to the Master, to compute principal, interest, and costs thereon, and, on payment of the same, stay the proceedings, by virtue of the 4 Anne, c. 16, s. 13, *ante*, p. 199; *Farquhar* v. *Morris*, 7 Durnf. & East, 142.

The question of interest is effectually prevented in the above precedent of a single bond, by making an express reservation thereof.

SINGLE BOND FOR UNLIMITED SUM.

Ireland, King, Defender of the Faith; and] in the year of our Lord one thousand eight hundred and ——.

Attestation.

SEALED AND DELIVERED, (being first duly stamped) (*c*), in the presence of

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Stamp.

(*c*) Stamp 25*l*. *vide ante*, p. 446, second class.

[STAMPS IMPOSED UPON BONDS, BY STAT. 55 GEO. 3, c. 184, p. 1561.

Bond in England, and personal bond in Scotland, given as a security for the payment of any definitive and certain sum of money not exceeding 50*l*.				1	0 0
Exceeding	50*l*.	and not exceeding	100*l*.	1	10 0
———	100*l*.	———	200*l*.	2	0 0
———	200*l*.	———	300*l*.	3	0 0
———	300*l*.	———	500*l*.	4	0 0
———	500*l*.	———	1,000*l*.	5	0 0
———	1,000*l*.	———	2,000*l*.	6	0 0
———	2,000*l*.	———	3,000*l*.	7	0 0
———	3,000*l*.	———	4,000*l*.	8	0 0
———	4,000*l*.	———	5,000*l*.	9	0 0
———	5,000*l*.	———	10,000*l*.	12	0 0
———	10,000*l*.	———	15,000*l*.	15	0 0
———	15,000*l*.	———	20,000*l*.	20	0 0
———	20,000*l*.			25	0 0
Bond in England, and personal bond in Scotland, given as a security for the re-payment of any sum or sums of money to be thereafter lent, advanced, or paid, or which may become due upon an account current, together with any sum already advanced or due, or without, as the case may be; Where the total amount of the money secured or to be ultimately recoverable thereupon, shall be uncertain and without any limit				25	0 0
And where the money secured or to be ultimately recoverable thereupon shall be limited not to exceed a given sum				*The same duty as on a bond for such limited sum.*	
Bond in England, and personal bond in Scotland, given as a security for the transfer or re-transfer of any share in any of the government or parliamentary stocks or funds, or in the stock and funds of the Governor and Company of the Bank of England, or of the East India Company, or of the South Sea Company.				*The same duty as on a bond for a sum of money equal to the value of the stock or fund secured according to the average price thereof on the day of the date of the bond, or on either of the 10 days preceding.*	

STAMPS UPON BONDS.

Bond in England, and personal bond in Scotland, given as a security for the payment of any sum of money, or for the transfer, or re-transfer of any share in any of the stocks or funds before-mentioned, which shall be in part secured by a mortgage or wadset, or other instrument or writing, hereinafter charged with the same duty as a mortgage or wadset, bearing even date with such bond, or for the performance of covenants contained in such mortgage or other instrument or writing, or for both those purposes	1	0	0
Bond in England, and personal or heritable bond in Scotland, given as the only or principal security for the payment of any annuity, upon the original creation and sale thereof.—See Conveyance upon the Sale of Lands, &c.			
Bond in England, and personal bond in Scotland, given as a collateral or auxiliary security for the payment of any annuity, upon the original creation and sale thereof, where the same shall be granted, or conveyed, or secured, by any other deed or instrument, liable to, and charged with, the *ad valorem* duty hereinafter imposed on conveyances upon the sale of any property	1	0	0
Bond in England, and personal or heritable bond in Scotland, given as a security for the payment of any annuity (except upon the original creation and sale thereof), or of any sum or sums of money at stated periods (not being interest for any principal sum, nor rent reserved or payable upon any lease or tack), for any definite and certain term, so that the total amount of the money to be paid can be previously ascertained.	*The same duty as on a bond of the like nature for the payment of a sum of money equal to such total amount.*		
Bond in England, and personal and heritable bond in Scotland given as a security for the payment of any annuity (except as aforesaid), or of any sum or sums of money at stated periods (not being interest for any principal sum, nor rent reserved or payable upon any lease or tack), for the term of life or any other indefinite period, so that the whole money to be paid cannot be previously ascertained.			
Where the annuity or sum secured shall not amount to 10*l.* *per annum*	1	0	0
And where same shall amount to 10*l.* and not to 50*l.* *per ann.*	2	0	0
—— 50*l.* —— 100*l.* ——	3	0	0
—— 100*l.* —— 200*l.* ——	4	0	0
—— 200*l.* —— 300*l.* ——	5	0	0
—— 300*l.* —— 400*l.* ——	6	0	0
—— 400*l.* —— 500*l.* ——	7	0	0
—— 500*l.* —— 750*l.* ——	9	0	0

STAMPS UPON BONDS.

And where the same shall amount to 750*l.* and not to 1,000*l.*	12	0	0
——— 1,000*l.* ——— 1,500*l.*	15	0	0
——— 1,500*l.* ——— 2,000*l.*	20	0	0
——— 2,000*l.* *per annum*, or upwards	25	0	0
But where there shall be both a personal and heritable bond, in Scotland, in separate deeds of the same date, for securing any such annuity, or sums payable at stated periods, and the *ad valorem* duty above charged thereon shall amount to 2*l.* or upwards, the heritable bond only shall be charged with the *ad valorem* duty, and the personal bond shall be charged only with a duty of	1	0	0
Bond, commonly called counterbond in England, and personal bond of relief in Scotland, for indemnifying any person who shall have become bound or engaged as surety or cautioner for the payment of any sum of money, or annuity(*a*), or for the transfer of any share in any of the stocks or funds before mentioned	1	15	0
Bond in England, and personal bond in Scotland, for the due execution of an office, and to account for money received by virtue thereof	1	15	0
Bond given pursuant to the directions of any act of Parliament, or by the direction of any commissioners of customs or excise, or any of their officers, for or in respect of any of the duties of customs or excise, or for preventing frauds or evasions thereof, or for any other matter or thing relating thereto	1	0	0
Bond entered into by any person on obtaining a marriage licence	1	0	0
Bond on obtaining letters of administration in England, or a confirmation of testament, in Scotland	1	0	0
Bond accompanied with a deposit of title deeds, for making a mortgage, wadset, or other security, on any estate or property therein comprised. See *Mortgage*.			
Back bond, declaration, or other deed or writing for making redeemable any disposition, assignation, or tack, apparently absolute, but intended only as a security. See *Mortgage*.			
Bond in England, and personal bond in Scotland, of any kind whatever, not otherwise charged in this schedule, nor expressly exempted from all stamp-duty	1	15	0
Heritable bond in Scotland, of any kind whatever, not otherwise charged in this schedule, nor expressly exempted from all stamp-duty	1	15	0

(*a*) *Vide* precedent of such a bond, *ante*, p. 386.

STAMPS UPON BONDS.

General Directions respecting Bonds.

Where any such bond as aforesaid, together with any schedule, receipt, or other matter put or indorsed thereon, or annexed thereto, shall contain 2,160 words or upwards, there shall be charged for every entire quantity of 1,080 words contained therein, over and above the first 1,080 words a further progressive duty of 1 5 0

And where any such bond as aforesaid shall be given as a security for the payment of a sum of money, and also of a share in any of the stocks or funds before mentioned, or an annuity, or both, or for the payment of an annuity, and also of a share in any of the said stocks or funds, the proper *ad valorem* duty shall be charged in respect of each.

And where any such bond as aforesaid shall be given as a security for the payment or transfer to different persons, of separate and distinct sums of money, or annuities, or shares in any of the stocks or funds before mentioned, the proper *ad valorem* duty shall be charged in respect of each separate and distinct sum of money, or annuity, or share in any of the said stocks or funds therein specified and secured, and not upon the aggregate amount thereof.

And where any bond in England shall be given as a security for the performance of any covenant or agreement for the payment or transfer of any sum of money, or annuity, or any share in any of the stocks or funds before mentioned, such bond shall be charged with the same duty as if the same had been immediately given for the payment or transfer of such money or annuity, or share of the said stocks or funds.

And where, in England, any bond for the payment or transfer, or for the performance of any covenant for the payment or transfer of any sum of money or annuity, or any share in any of the stocks or funds before mentioned, shall be contained in one and the same deed or writing with any other matter or thing in this schedule specifically charged with any duty (except any declaration of trust of the money, annuity, stock or fund secured), such deed or writing shall be charged with the same duties as such bond and other matter or thing would have been charged with if contained in separate deeds.

But where, in England, a bond for the performance of covenants or agreements (other than for the payment or transfer of any sum of money, annuity, or any share in any of the said stocks or funds), shall be contained in the same deed or writing with any other matter or thing, the same shall not be charged separately, but the whole shall be considered as one deed, and be charged accordingly, under its proper denomination.

Exemptions from the preceding and all other Stamp Duties.

Bonds of the Royal Exchange and London Assurance Corporations ex-

STAMPS UPON BONDS.

empted from stamp duty by the act of the 6th year of the reign of king George the 1st, under which they were incorporated.

Bonds and other securities exempted from stamp duty, by the act of the 26th year of his present majesty's reign, or any other act now in force for the encouragement of the British fisheries.

Bonds exempted from stamp duty, by the act of the 28th year of his present majesty's reign, or any other act now in force relating to the exportation of wool, or any manufacture thereof, or fuller's earth, fulling-clay, or tobacco-pipe-clay, or by the act of the 29th year of his majesty's reign, or any other act now in force relating to the exportation of tobacco from his majesty's warehouses.

Coast-bonds, or bonds relative to the carrying of goods or merchandize, coast-wise, whether the same shall be given pursuant to the act of the 23rd year of his majesty's reign, or any other act now in force for the relief of the coast trade of Great Britain, or pursuant to the directions of any proclamations or order in council by his Majesty, his heirs, or successors.

Bonds and other securities exempted from stamp duty, by the act of the 33rd year of his majesty's reign, or any other act now in force, for the encouragement of friendly societies.

Bonds given by card-makers, for securing the stamp duties on playing cards.

Bonds given by the proprietors, printers, or publishers of newspapers, for securing the payment of the duties upon the advertisements therein contained.

Bonds given by stationers and others, who sell stamped paper for the printing of newspapers, for the due performance of the matters required of them by the act passed in the 38th year of his Majesty's reign, for regulating the printing and publication of newspapers.

Bonds given by collectors of assessed taxes and their sureties, for the due payment of monies collected by them, or otherwise relating to their offices.

Administration and confirmation bonds given by the widow, children, father, mother, brother, or sister, of any common seaman, marine, or soldier, who shall be slain or die in the service of his majesty, his heirs, or successors.

Administration bond in England given by any person, where the estate to be administered shall not exceed 20*l.* in value.

Confirmation bond in Scotland, where the whole personal estate of the deceased shall not exceed 20*l.* in value.

See also the general exemptions at the end of this part of the schedule.

What held to be a bond to secure a "definite and certain" sum of

What is considered to be a bond for the payment of a "definitive and certain sum" of money within the meaning of the act, has in many instances been a subject of controversy.

STAMPS UPON BONDS.

money within the meaning of the stamp act.

In the case of *Attree* v. *Anscomb*, 2 Maule & Selwyn, 88, A., B., and C. executed a bond for 1,730*l.*, to the treasurer of the paving commissioners of the town of D., conditioned for the payment by A. of the yearly rent of 865*l.*, by four quarterly payments, for the tolls arising from the market of D., let by the commissioners to him for two years: it was held that this was a bond for the payment of a definite and certain sum, though payable at future periods, and ought therefore to have been stamped as a bond to secure the payment of a sum equal to the aggregate amount of the several quarterly payments, *i. e.* exceeding 1,000*l.* (This case arose on the statute 48 Geo. 3, c. 149, the terms of which, in describing bonds liable to an *ad valorem* duty, are similar to those of the last act).

In the late case of *Mounsey* v. *Stephenson*, 7 Barn. & Cress. 403, an action of covenant was brought on articles of agreement, whereby the plaintiff agreed to pay the defendant a salary of 35*l. per annum*, and the defendant covenanted not to set up a chemist's shop within one mile of the plaintiff's; and the plaintiff and defendant were mutually bound in a penalty of 600*l.*, to perform the agreement. In an action for opening a chemist's shop, the articles of agreement were produced, impressed with a stamp of 1*l.* 15*s.* For the defendant it was objected, that the instrument was to be considered as a bond to secure the payment of an annual sum of money, or as a bond with a penalty to secure the performance of an agreement, and in either case the stamp was insufficient. The point was reserved at *Nisi Prius*, and the Court was now of opinion that the stamp was sufficient. Lord *Tenterden*, C. J. "If you take this instrument as a bond, it is not for the payment of an annuity, nor for the payment of any certain sum of money. It is not a bond of any of the kinds specified in the stamp act, and was therefore liable to a stamp duty of 1*l.* 15*s.* as a bond 'not otherwise charged.' If you treat it as a bond conditioned for the performance of agreements contained in the same instrument, the statute expressly states, that it shall not be subject to a separate duty. Taking the instrument as a common deed, the stamp was sufficient. There is not therefore any ground for disturbing the verdict."

A bond by which several persons become bound to secure the same sum of money, or for the performance of the same act, is only liable to one stamp, though it operates as the several bond of each. The case is analogous to that of a composition deed, where each creditor covenants separately in respect of his own debt, to enlarge the time of payment, or compound for a certain sum, and yet a separate stamp is never required. *Bowen* v. *Ashley*, 1 New Rep. 274. *Vide ante*, p. 5.

Ad valorem duty on bonds may be avoided by the substitution of covenants.

The *ad valorem* duty on bonds might always be avoided by using deeds of covenant instead of them. It is remarkable that the legislature has not placed covenants to pay money (unless contained in deeds on which the *ad valorem* duty has been paid, as in the case of mortgages) on the same footing as bonds, in this respect, and it is equally remarkable that so little

STAMPS UPON BONDS.

advantage has been taken by the public of this exemption; especially in cases where the object is to secure the payment of an indefinite sum of money, and where therefore the *maximum* duty of 25*l.* attaches. In some cases, indeed, before the late bankrupt act, a bond-creditor had an advantage over a covenant-creditor, inasmuch as the penalty of a forfeited bond was proveable, when no proof could have been received under a broken covenant (*ante*, p. 262); but as the value of contingent debts may now be proved, whether secured by a bond or covenant, or not secured by either, this advantage has ceased, and it may be confidently affirmed that a covenant is equally efficient and beneficial with a bond for every purpose. Where however the sum to be secured is small, little is gained by resorting to the expedient here suggested; indeed, where it does not exceed 100*l.*, or is less than the annual sum of 10*l.*, the stamp on the bond is even less than that of the covenant. (*See some Forms of Covenant added by the present Editor, at the end of this volume*).]

PARTICULAR BONDS.

See further as to Bond, *titles* Annuity, Arbitration, Indemnity, Mortgage, *and* Settlement; *and* Index to the Precedents, *title* Bond.

CHARITABLE USES.

For Charitable Uses, *see title* Trust.

CLERKSHIP & APPRENTICESHIP.

See Solicitors.

COGNOVIT ACTIONEM.

See Warrant of Attorney.

CONFIRMATION.

Confirmation.

A *confirmation* is an approbation of, or assent to, an estate already created; by which the confirmor strengthens and gives validity to it, as far as it is in his power. It has this operation only with respect to estates *voidable* or defeasible; but it has no operation upon estates which are absolutely *void.* Butl. n. Co. Litt. 295 b, (1).

Operative words.

The usual operative words are, "given, granted, ratified, approved, and confirmed." 2 Bla. Com. 325. However, either the three latter, Litt. s. 515, or either of the two former alone, will operate as a confirmation. Litt. s. 531. And such additional words may be mixed with the words of confirmation as may increase or enlarge the estate; but that is effected by the force of such additional words, and, strictly speaking, is foreign to the confirmation. Gilb. Ten. 75.

Effect of a confirmation.

A confirmation to a tenant of freehold or inheritance cannot be so worded as to have a less operation than that of confirming his whole estate; consequently, a confirmation to such a tenant, either of the lands, or of his estate in them, for any term or period, is a confirmation of his whole fee. A disseisor always acquires by the disseisin a tortious fee simple; a confirmation therefore to him, however qualified, is a confirmation of his whole fee. It is otherwise in the case of a term for years. A confirmation may be made of part of the term only. The reason of this difference is, that an estate of freehold or of inheritance is considered as integral and indivisible. But as years are several, the term which is composed of them is necessarily fractional and divisible, and may consequently be confirmed in part only, by using proper expressions for this purpose. If a person confirms *the estate* of the tenant for years for part of the term, as the word estate signifies all the interest or term of years which the tenant has, the subsequent words are not considered as qualifications of the former words, but as absolutely repugnant to them; and as both cannot stand together, the law prefers the first, which are the principal, to the other, which are only secondary. Butl. n. Co. Litt. 297 a, (1).

If there be nothing more than a confirmation of title, there cannot be any uses or trusts, 3 Pres. Abs. 119, because no seisin passes.

So, as there must be a particular estate to support even a vested remainder, which precedent estate must be formed at the same time with the remainder; Plow. 25; therefore, if a reversioner in fee *confirm* the estate of a lessee for years, and limit the remainder, it is void: because the term was antecedent to the remainder, and not created with it by the same instrument at the same time. So, if a reversioner *confirm* the estate of tenant for life, the remainder over, such remainder is void: for no change is made in the particular estate. Dr. & Stud. Dial. 11, c. 20. (It is remarkable that this passage of the excellent author is cited so early as by Chief Justice *Brooke*, Abr. tit. *Done & Remainder*, pl. 45; *Estates*, pl. 80). But if the particular estate existing be by *confirmation enlarged*, as if a reversioner confirm the estate of tenant *pur auter vie* for the tenant's own life, or confirm the estate of tenant for life *in tail*, the remainder over, such remainder is good. 2 Roll. Abr. 415, pl. 8; 18 Vin. Abr. 382. 2 Wooddes. Vinerian Lectures, 178.

Modern deeds called confirmations are not, strictly speaking, confirmations; for, being generally by lease and release, they have a more extensive operation than a simple confirmation at common law†. For a form of a confirmation at common law, *vide post*, pp. 489, 496.

By whatever method a confirmation is effected, if there be any *suppressio veri aut suggestio falsi*, 3 Inst. 238, the confirmation may be set aside in equity. *Vide ante*, p. 226; and Vol. 1, p. 156.

Suggestion as to deeds of confirmation.

[† Where a deed is executed by an heir-at-law, in order to confirm a devise which is suspected to be invalid, it ought always to be made by lease and release, or some other assurance sufficient to pass the inheritance between third persons, and not by way of confirmation or release merely, which would be inoperative, except as between the parties themselves, unless it could be shewn that the devisee had by his entry and adverse possession acquired a tortious estate; a doctrine to which the Courts are now much disinclined. *Vide post*, Vol. 4, pp. 122, 129, 149, 150.]

RELEASE *by way of* CONFIRMATION *by an Heir-at-Law of an Estate mentioned to be devised by a Will unattested, and where the Words of the intended Devise extended only to the Life of the Devisee; the Heir claiming a conditional* (*a*) *Benefit under the Will, and thinking that it was the Testator's Intention to give the Fee.*

UNATTESTED WILL, TO DEVISEE IN FEE.

THIS INDENTURE, made the —— day of ——, in the year 18—, BETWEEN [*heir*], of &c., esquire, one of the brothers, and heir-at-law of [*testator*], late of &c., esquire, deceased, of the one part; and [*devisee*], of &c., gentleman, of the other part. WHEREAS the said [*testator*] made and signed his last will and testament in writing, bearing date on or about the —— day of ——, 18—, but without being published by him in the presence of, or attested by witnesses, and after thereby bequeathing several pecuniary legacies and annuities to the persons therein named, did give and bequeath to his brother the said [*heir*], an annuity of one hundred pounds a year; *And* the said testator did give his freehold in ——shire to his nephew [*devisee*], and directed that, if his brother [E.(*heir*)] should lay any claim to it, he might have it, but in that case no other interest in his said will, no more than if his name had not been mentioned: *And* the said testator did nominate his nephew, the said [*devisee*], and [T. K.] executors of his said will. AND WHEREAS the said* testator [——] departed this life on or about the —— day of ——, 18—, without issue, leaving the said [*heir*], his brother, his heir-at-law, and without altering or revoking his said

Parties.

Recital of a will which was signed, but not published in the presence of witnesses:

testator's death and probate:

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(*a*) If in an unattested will there is a legacy to the heir, upon condition that he do not dispute the will, he is put to his election. *Boughton* v. *Boughton*, 2 Ves. sen. 12.

UNATTESTED WILL, TO DEVISEE IN FEE.

will, which hath been duly proved in the Prerogative Court of the Archbishop of Canterbury. And whereas the signing of the said recited will by the said testator [——] not having been attested and subscribed in the presence of the said testator by three witnesses, the devise therein expressed to be made of the said testator's freehold estate in ——shire did not, it is apprehended, pass such freehold estate to his said nephew, [*devisee*]; but the said [*heir*], as heir-at-law of the said testator, being willing to comply with the terms of the said will, and being desirous of fulfilling the intention of the said testator, in respect to the devise of the said freehold estate in ——shire; and being well satisfied that the said testator intended that such devise should carry the fee simple of the said ——shire estate unto the said [*devisee*], hath, at the request of the said [*devisee*], agreed to confirm the said recited will in respect to the devise therein contained of the said freehold estate in ——shire, by releasing and assuring the same estate unto and to the use of the said [*devisee*], his heirs and assigns, in manner hereinafter mentioned. NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, and in consideration of the premises; and for and in consideration of the sum of five shillings of lawful money of Great Britain to the said [*heir*] in hand, paid by the said [*devisee*], at or before the sealing and delivery of these presents; the receipt whereof is hereby acknowledged; *He*, the said [*heir*], at the request and by the direction of the said [*devisee*], (testified by his being a party to, and executing these presents), and according to his estate, right, and interest, but no further or otherwise, *hath* bargained, sold, aliened, released, and confirmed; *And* by these presents *doth* bargain, sell, alien, release, and confirm unto the said [*devisee*], (in his actual possession, &c. *ut ante*, Vol. 1, p. 655), and to his heirs; *All* and singular the freehold messuages, lands, tenements, and hereditaments which the said testator [——] was, at the time of his signing the said recited will, seised of or entitled to, at law, or in equity, situate, lying, and being in *the county of ——; Together with all houses, &c. (*ut ante*, Vol. 1, p. 656). And the reversion, &c. And all the estate, &c. To have and to hold the said messuages,

that will was unattested and defective:

but heir-at-law is willing to confirm intended devise.

Testatum.

Release in fee from heir-at-law to intended devisee.

Parcels.

General words.

[*475]

Habendum to

lands, tenements, hereditaments, and all and singular other the premises hereinbefore expressed to be hereby released, with their rights, members, and appurtenances, unto the said [*devisee*], his heirs and assigns, for ever; To *the use* of the said [*devisee*], his heirs and assigns for ever. AND THE SAID [*heir*] doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the said [*devisee*], his heirs and assigns; that he the said [*heir*] hath not at any time heretofore made, done, executed, committed, or willingly or knowingly suffered, or consented to any act, matter, or thing whereby or by reason or means whereof the said hereditaments and premises hereinbefore expressed to be hereby released, or any part thereof, are, is, can, shall, or may be impeached, charged, released, conveyed, assured, or in any wise incumbered: AND MOREOVER that he the said [*heir*], and his heirs, and every other person having or lawfully or equitably claiming, or who shall or may have or lawfully or equitably claim any estate, right, title, or demand in, to, or out of the said hereditaments and premises hereinbefore expressed to be hereby released, or any of them, or any part thereof, by, from, through, under, or in trust for him or them, shall and will from time to time, and at all times hereafter, upon every reasonable request, and at the proper costs and charges in the law of the said [*devisee*], his heirs or assigns, make, do, acknowledge, levy, suffer, and execute; or cause and procure to be made, done, acknowledged, levied, suffered, and executed, all such further and other lawful and reasonable acts, deeds, things, devices, conveyances, and assurances in the law whatsoever, for the further, better, more perfectly, lawfully, and absolutely granting, releasing, conveying, and assuring all and singular the hereditaments and premises hereinbefore expressed to be hereby released, or any of them, or any part thereof, with their and every of their rights, members, and appurtenances, unto and to the use of the said [*devisee*], his heirs and assigns for ever, or as he or they shall direct or appoint, be the same by fine, feoffment, common* recovery, deed enrolled or not enrolled, or any other matter of record or not of record, or other-

the use of devisee in fee.

Covenant by heir-at-law that he hath not incumbered:

and for further assurance.

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UNATTESTED WILL TO DEVISEE IN FEE.

wise howsoever; *As* by the said [*devisee*], his heirs, or assigns, or his or their counsel in the law, shall be reasonably devised, or advised and required; *So* that any such further assurance or assurances do not contain or imply any further warranty or covenant than against the person or persons who shall be required to make and execute the same, his, her, and their heirs', executors', administrators', acts, and deeds only; *And so* that the person or persons who shall be required to make and execute such further assurance and assurances, be not compelled nor compelable, for the making or doing thereof, to go or travel from his, her, or their usual place or places of residence or abode. IN WITNESS, &c.

UNATTESTED WILL TO TRUSTEE FOR A TERM TO PAY DEBTS; REMAINDER IN TAIL, &c.

CONFIRMATION *by an Heir-at-Law of a Will executed in the Presence of two* (*a*) *Witnesses only, by a* RELEASE *in Fee, To the use of a Trustee for* 500 *Years; Remainder, to the use of a Son, a Devisee in Tail; Remainder, to the use of a Daughter, a Devisee in Fee;* DECLARATION *that the Premises shall be subject to the Payment of such of the Testator's Debts, &c., as they would have been liable to in case his Will had been duly executed: and that the Term of* 500 *Years was limited to the Trustee to raise Money for Payment of Debts, &c., and, subject thereto, to attend the Uses limited.*

THIS INDENTURE, made the —— day of ——, 18—,

Parties.

BETWEEN [*heir*], of &c., (eldest son and heir of [*testator*],

There must be three witnesses to a valid devise of an estate in fee

(*a*) By the statute of frauds and perjuries, 29 Car. 2, c. 3, ss. 5 and 12, a will of fee simple lands or tenements, or any estate *pur auter vie*, must be signed by the testator, or by some person for him in his presence, and

UNATTESTED WILL TO TRUSTEE FOR A TERM TO PAY DEBTS; REMAINDER IN TAIL, &c.

late of &c., deceased), of the first part; [G. D.], of &c., of the second part; [W. D.], of &c., (son of the said [*testator*], deceased,) of the third part; and [M. H.], of &c., and Mary his wife, (daughter of the said [*testator*],) of the fourth part. WHEREAS the said [*testator*], deceased, made his last will and testament in writing, bearing date the —— day of ——, and thereby, after giving several specific and pecuniary legacies, which he directed should be discharged by his said son [W. D.], and directing him also to pay his debts and funeral expenses, gave to him all his real and personal estates for him and his heirs for ever: *And* if he should die without issue, then he devised the same to his daughter, the said Mary H. then Mary D., and her heirs. AND WHEREAS the said [*testator*], the father, was, at the time of making his said will, and at the time of his decease, seised of or entitled to a considerable real estate, comprising the messuages and hereditaments hereinafter mentioned to be hereby released: AND in regard that the said will of the same [*testator*] was executed by him in the presence of, and attested by two witnesses only, the same is void and ineffectual in law, so far as the same relates to his said real estate; and consequently the same estate, by and upon his decease, descended and came to the said [*heir*], party hereto, as his heir-at-law. AND WHEREAS the said [*heir*], party hereto, out of his great regard to the memory of his said father, and in order to do justice to his intention expressed in his said will, has *proposed and agreed to convey, settle and assure the said real estate to the uses, and in manner hereinafter mentioned, expressed, and declared, of and concerning the same. NOW THIS INDENTURE WITNESSETH, that, for the end and purpose aforesaid, and

Recital of will:

that testator was seised of real estate:

that will was executed in the presence of two witnesses only:

that heir hath agreed to convey the real estate as hereinafter mentioned.

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Testatum. Release in fee from heir.

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by his direction, and be attested and subscribed in his presence by three witnesses.

simple, or *pur auter vie.*

In a devise of a trust or equitable estate in freehold lands or tenements, the formalities of execution and attestation required by the statute are as necessary to be observed as in wills disposing of the legal estate. *Wagstaff* v. *Wagstaff*, 2 P. Wms. 258.

By 55 Geo. 3, c. 192, dispositions by will of copyhold estates are made effectual without previous surrenders to the uses thereof; but no particular ceremonies are requisite to the validity of such a disposition.

But no witness is requisite to a testamentary disposition of copyholds.

UNATTESTED WILL, TO TRUSTEE FOR A TERM TO PAY DEBTS; REMAINDER IN TAIL, &c.

in consideration of ten shillings of lawful money of Great Britain to the said [*heir*], party hereto, in hand paid by the said [G. D.], at or before the sealing and delivery hereof; the receipt whereof is hereby acknowledged; *He* the said [*heir*] *hath* bargained, sold, released, and confirmed; *And* by these presents *doth* bargain, sell, release, and confirm, unto the said [G. D.], his heirs and assigns (in his actual possession, &c, *ut ante*, Vol. 1, p. 655). ALL, &c. AND all other the messuages, buildings, hereditaments, and other real estate late of him the said [*testator*], deceased, which at the time of his making his said will, and at the time of his death, he was seised of or entitled to, either at law or in equity. [*Add general words; reversion; and all the estate, &c. ut ante*, Vol. 1, p. 656.] TO HAVE AND TO HOLD the said messuages or dwelling-houses, hereditaments, and premises mentioned and intended to be hereby released, with their appurtenances, unto the said [G. D.], his heirs and assigns, to and for the several uses, upon the trusts, and subject to the declarations and agreements hereinafter expressed and declared of and concerning the same: that is to say; TO THE USE of the said [G. D.], his executors, administrators, and assigns, for and during and unto the full end and term of five hundred years now next ensuing, and fully to be complete and ended: AND from and after the end or other sooner determination of the said term, TO THE USE of the said [W. D.], and the heirs of his body lawfully to be begotten: AND, in default of such issue, TO THE USE of the said [M. H.], her heirs and assigns for ever. [*Add covenant from* [*heir*] *to* [W. D.] *for further assurance.*] AND *it is hereby agreed and declared* by and between the parties hereto, that the messuages, hereditaments, and premises hereinbefore mentioned to be hereby released, shall be subject and liable to the payment of so much and such part of the debts and funeral expenses of the said [*testator*], deceased, and of the legacies in his said will mentioned, so far as, and no farther or otherwise than, *the same premises would have been subject and liable to the payment thereof in case the same will had been duly executed, as the law requires, for the disposition of real estates. AND *it is hereby also agreed and declared*, that the said premises are and were so limited to the said [G.

Parcels.

Sweeping clause.

General words.

Habendum to releasee in fee.

To the use of trustee for 500 years;

Remainder,

To the use of a son, a devisee in tail;

Remainder, To the use of a daughter, a devisee in fee.

Declaration, that the premises shall be subject to the payment of such of the testator's debts, &c. as they would have been liable to in case his will had been duly executed; and that the term of 500 years was limited to trustee, to raise money for payment of debts, &c.

D.], his executors, administrators, and assigns, for the said term of five hundred years, UPON TRUST, by mortgage of the same premises, to raise such sum or sums of money as shall be requisite and necessary to pay and satisfy so much and such part of the said debts, funeral expenses, and legacies accordingly: AND that, subject to the same trust, the said term shall attend the several uses hereinbefore declared concerning the premises therein comprised. IN WITNESS, &c.

UNATTESTED WILL TO TRUSTEE FOR A TERM TO PAY DEBTS; REMAINDER IN TAIL, &c.

and subject thereto, to attend the uses limited.

CONFIRMATION *of a Will by an Heir-at-Law, to prevent the Necessity of proving it in Chancery (a); being a* RELEASE *in Fee, and of Leasehold, for Lives; with a* COVENANT TO SURRENDER *Copyholds to the Trustees of the Will, to be held to and for the Uses, and upon the Trusts, declared by the Will, and to be subject to the Sums of Money thereby charged on the Lands.*

RELEASE IN FEE, AND FOR LIVES; AND COVENANT TO SURRENDER COPYHOLDS.

THIS INDENTURE, made the —— day of ——, in the year of our Lord 18—, BETWEEN [*heir*], of &c., spinster (cousin and heir-at-law of [*testatrix*], late of &c., spinster, deceased), of the one part; and [*trustee*], of &c., and [*other trustee*], of &c., of the other part. WHEREAS

Parties.

(*a*) "CASE.

(*After referring to a copy of the will of J. H. and stating that it was made* 15 *years since.*)

Case, and the opinion of counsel, on the validity of a devise attested by two infants and one adult.

"The witnesses were of the following ages at the time of the publication of the will; viz. George H. about thirteen years, Samuel M. about eleven years and a half, and Hannah P. about twenty-three years. The two first witnesses signed their own names; Hannah P. made a mark, and the testator wrote the words, 'Hannah P.'s mark.' Although Hannah P. signed by a mark, yet she has a perfect recollection of the whole of the transaction. The three witnesses are all living, and capable of attesting their several signatures; and were at the time of the publication

RELEASE IN FEE, AND FOR LIVES; AND COVENANT TO SURRENDER COPYHOLDS.

Recital of will in *hæc verba:* death of testatrix:

seisin of freehold, copyhold, and leasehold for lives:

agreement to confirm:

the said [*testatrix*] made and executed her last will and testament in writing, bearing date the —— day of ——, 18—, and in the words following: that is to say; "This is the last will and testament of me," &c., [*state the will, and the signature and attestation, in the very words*]. AND the said [*testatrix*] afterwards departed this life, without revoking or altering her said will, leaving the said [*heir*] her cousin and heir-at-law. AND WHEREAS the said [*testatrix*] was, at the time of making her said will, and at the time of her decease, seised of the inheritance in fee simple in possession of and in the manor of ——, and of and in divers freehold and copyhold messuages, lands, tenements, tithes, and hereditaments, situate and being, or arising in, &c., and hereinafter mentioned, and intended to be hereby released; and was also seised or entitled to divers leasehold messuages, lands, and tenements, situate and being at —— aforesaid, and held by several leases respectively made for three lives by the late Lord Bishop of Durham to the said [*testatrix*]. AND WHEREAS the said [*heir*] having no reason to entertain a doubt, either with respect to the sanity of the said [*testatrix*] at the time of making her said will, or with respect to the due

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of the will, and are at the present period, of good understanding and discretion.

"Your opinion is requested,

"Whether, under the above-mentioned circumstances, these three witnesses are competent, and sufficient to prove the will of J. H.?"

"Perhaps the will may be supported, but a purchaser cannot be advised to accept the title without a confirmation from the heir-at-law, or a decree establishing the will *per testes*.

"It is not sufficient that there should be attesting witnesses; they must be credible, that is, competent witnesses.

"They are to be judges of the sanity of the testator; in very few instances are persons of the age of eleven or thirteen competent to judge of the sanity of a testator, or the circumstances under which his will is made: and I should not be surprised to find, that the Court came to the resolution, that a witness of the age of eleven years was, in no case, a witness competent to attest the execution of a will of real estate.

"12th Nov. 1817."

RELEASE IN FEE, AND FOR LIVES; AND COVENANT TO SURRENDER COPYHOLDS.

execution thereof; and being satisfied it was her intention, at the time of making and executing her said will, that the said manor, messuages, lands, tithes, hereditaments, and real estate should go to, and be held and enjoyed by, the several persons, in such order, course, and succession, and for such estates and interests, and subject to such charges and annuities, as in the said will are mentioned; she the said [*heir*], in order to do justice to that intention, as expressed in the said will, and to prevent the expense of proving the same in a court of equity, for the perpetuating the testimony of the witnesses thereto (*b*), is very willing and desirous that the said will, and all the devises and bequests thereby made, shall in all things be confirmed and made good and effectual, according to the purport and the true intent and meaning thereof. NOW THIS INDENTURE WITNESSETH, that, for attaining the ends and purposes hereinbefore mentioned, and in consideration of ten shillings, of &c., *she* the said [*heir*] *hath* bargained, sold, released, and *confirmed; And* by these presents *doth* bargain, sell, release, and confirm unto the said [*trustees*], (in their actual possession, &c. *ut ante*, Vol. 1, p. 655,) and to their heirs, *All* that, &c. (*add general words; reversion; and all the estate, ut ante*, Vol. 1, p. 656.) TO HAVE AND TO HOLD the said manor, messuages, lands, tithes, heredita-

First testatum. Release of the fee simple lands.

Habendum to the trustees in fee,

That the above opinion cannot be supported, seems very clear. The will was made fifteen years before the question arose. The witnesses were all of them living; and they were persons of the clearest reputation, and had a perfect recollection of the execution of the will; they were only required to prove, after their majority, a fact which occurred during their infancy.

Besides, it is clear, that, if an infant be of the age of *fourteen* years, he is of the age of discretion to be sworn as a witness; Gilb. Evid. 4th ed. 144, 6th ed. 130; and *before*, if he appears to understand an oath, or rather, as it is expressed by Lord *Hale*, hath *competent* discretion. 2 Hale's P. C. 278, Wilson's ed. c. 37. Hargr. n. Co. Litt. 172 b, (1).

There seems to be no precise age fixed, at which infants are excluded from being witnesses. At one time, indeed, their age was considered as the criterion of their competency; and it was a general rule, that

(*b*) It is always preferable, that the heir-at-law should be apprised of the ground on which his confirmation is required.

RELEASE IN FEE, AND FOR LIVES; AND COVENANT TO SURRENDER COPYHOLDS.

To the uses, and upon the trusts of the will.

ments, and all and singular other the premises hereby granted, released, and confirmed, or intended so to be, and every part and parcel thereof, with their and every of their rights, members, and appurtenances, unto the said [*trustees*], their heirs and assigns, To and for the several uses, upon the trusts, and to and for the intents and purposes, and with, under, and subject to the powers, provisoes, and declarations expressed and declared of and concerning the same premises, or any part or parts thereof, in and by the said will of the said [*testatrix*], and subject to the several annuities and sums of money therein given and devised, to be paid by and out of the same premises, or some part or parts thereof. AND THIS INDENTURE FURTHER WITNESSETH, that for attaining the ends and purposes, and for the considerations hereinbefore mentioned, *She* the said [*heir*], *hath* bargained, sold, released, and confirmed, *And* by these presents, *doth* bargain, sell, release, and confirm unto the said [*trustees*], (in their possession (*c*), &c., (*ut ante*, Vol. 1, p. 655,) and to their heirs, ALL THOSE, &c. (*describe the leasehold premises; add general words for farms, ut ante*, Vol. 1, p. 656, *reversion, &c. and all the estate*, &c.). TO HAVE AND TO HOLD the said &c., hereby lastly granted, released, and confirmed, or intended so to be, and every part and parcel thereof, with their and every of their

Second testatum. Release of the leaseholds for lives.

Habendum to the trustees, To the uses, and upon the trusts of the will.

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none could be admitted under the age of nine years, very few under ten; *Rex* v. *Travers*, 2 Str. 700; and cases in East, P. C. 442, S. P.; 1 Hale's P. C. 302; 2 Hale's P. C. 278; *Young* v. *Slaughterford*, 11 Mod. 228; 2 Hawk. P. C. bk. 2, ch. 46, s. 27; which was in some measure denying them the protection of law against secret acts of violence. Bull. N. P. 293. A more reasonable rule has been since adopted: and the admissibility of children is now regulated, not by their age, but by their apparent sense and understanding. In *Brazier's* case, on an indictment for assaulting an infant of five years of age with intent to ravish her, it was agreed by all the judges, that children of any age might be examined on oath, if capable of distinguishing between good and evil: but that they cannot be examined in any case without an oath. *Brazier's* case, 1799. 1 East, P. C. 443, 444; Bull. N. P. 293; 1 Leach, Cr. C. 237; 4 Bla. Com. 214. This is now the established rule in all cases, criminal as well as civil, and whether the prisoner is tried for a capital offence, or

(*c*) On the transfer and surrender of estates for lives, *vide ante*, p. 172, n.(*a*).

RELEASE IN FEE, AND FOR LIVES; AND COVENANT TO SURRENDER COPYHOLDS.

appurtenances, unto the said [*trustees*], their heirs and assigns, for and during the several estates, term, and interest thereof respectively granted in and by the several leases by which the same are now respectively held, *To* and for the several uses, &c., (*ut supra*), or as near thereto as may be, and the nature of the estates will admit of. AND THIS INDENTURE FURTHER WITNESSETH, that, for attaining the ends and purposes, and for the considerations, hereinbefore mentioned, *She* the said [*heir*], doth hereby for herself, her heirs, executors, and administrators, covenant, promise, and agree with and to the said [*trustees*], their heirs and assigns, that she the said [*heir*], shall and will, at the request, costs, and charges of the said [*trustees*], their heirs or assigns, surrender into the hands of the lord or lords, lady or ladies of the said manor of ——, for the time being, according to the custom of the said manor, ALL THOSE several pieces or parcels of land, situate, lying, and being at ——, within the said manor of ——, and containing by estimation, &c. AND all other the lands, tenements, and hereditaments whatsoever, late of her the said [*testatrix*], deceased, holden of the said manor by copy of court roll, with their rights,

Third testatum. Covenant to surrender copyholds.

Parcels.

Sweeping clause.

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for one of an inferior nature. When the child has appeared not sufficiently to understand the nature and obligation of an oath, judges have often thought it necessary, for the purpose of justice, to put off the trial of the prisoner, directing that the child in the mean time should be properly instructed. 1 Phillips on Evidence, 18, 6th ed. Archbold on Pleading and Evidence, 388.

To obviate every difficulty in the case above referred to, the recital in the deed of confirmation contained these words:

"And the said testator signed, sealed, published, and declared his said last will and testament in the presence of George H., of &c., then an infant of about the age of thirteen years, Samuel M., of &c., then also an infant of about the age of eleven years and a half, and Hannah P., of &c. AND the said George H. and Samuel M. subscribed their respective names, and the said Hannah P. subscribed her mark, to the said will, in the presence of the said testator, and of each other."

That no objection existed on account of Hannah P.'s signing by a mark, is very clear. *Vide ante*, Vol 2, p. 659, n. (*b*).

To the use of trustees,

To the uses, and upon the trusts of will.

Proviso, that these presents shall not prejudice an annuity given to heir by the will.

members, and appurtenances, To THE USE of the said [*trustees*], their heirs and assigns for ever, according to the custom of the said manor; To and for the several uses, &c. (*ut supra*), or as near thereto as may be, and the nature of the estates will admit. PROVIDED ALWAYS, *and it is hereby agreed and declared*, that these presents, or any thing herein contained, shall not defeat or prejudice, nor be construed, deemed, or taken to defeat or prejudice the said annual sum of —— pounds in and by the said will of the said [*testatrix*], given to, or directed to be paid to, the said [*heir*] during her life. IN WITNESS, &c.

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IN FEE TO DEVISEE.

CONFIRMATION, *of a Devise by the Testator's Heir-at-Law* (*a*).

Exordium.

TO ALL PERSONS TO WHOM THESE PRESENTS SHALL COME, [*heir*], of &c., (brother and heir-at-law of [*testator*], late of &c.,) and [*devisee*], of &c., (eldest son and heir apparent of said [*heir*], and the sole devisee of the real

Case.

(*a*) CASE, with Mr. BOOTH's opinion on the above-mentioned devise.

"I, Edward T. G. H., of &c, being of sound and disposing mind, &c. do, on the —— day of ——, one thousand seven hundred and seventy-two, constitute and appoint my brother, I. H., and my nephew, T. H, eldest son of the said I. H., to be joint executors and administrators, and do desire them earnestly to see it executed. As to my personal estate, I give as follows: *Imprimis*, I give unto my nephew, I. H., second son to my brother, I. H., my gold watch, provided he can have it to his own use and benefit, and for his own property; also one hundred pounds, on the same condition: otherwise he is not to enjoy them; this to be at the pleasure of my brother and nephew. *Item.* I give, &c., to ——, to be paid him by my heir and nephew T. H., *whom I do appoint my heir. Item.* I give, &c., to H. H., third son of my said brother, I. H., to be paid him by my heir and nephew T. H., within, &c. *Item.* I give and bequeath unto the above-named T. H. all my real and personal estate,

IN FEE TO DEVISEE.

estate, and the residuary legatee of the personal estate, and also one of the executors named in the last will and testament of the said [*testator*], SEND GREETING. WHEREAS the said [*testator*] did, on or about the —— day of —— last past, make his last will and testament in writing, and did duly sign, seal, publish, and execute the same in such manner, and with such usual forms and ceremonies attending the execution thereof as the law prescribes and requires for rendering the devises of lands and hereditaments valid and effectual: AND which said last will and testament is in the words or to the purport following: that is to say; "I Edward T. H. G., of &c. (*set out the whole of the will and the attestation, with the signatures.*) AND WHEREAS said [*testator*] departed this life on or about the —— day of —— last past, without revoking or altering his said will: AND the said [*devisee*], since his death, hath alone duly proved the said will in the Prerogative Court of the Archbishop of Canterbury: AND he hath also caused the said will to be enrolled in his Majesty's Court of Common Pleas, at Westminster. AND WHEREAS upon the death of the said [*testator*], the said [*devisee*], by virtue of the said will, entered upon the real estates whereof the said [*testa-*

Recital of will in *hæc verba*.

Death of testator,

and proof of will.

enrolment of will (he being a papist):

seisin by devisee,

(except as herein excepted,) likewise my allotment of waste ground, to be assigned as my share in the parish of K., I give to the said T. H. *Item.* &c., to be paid by my heir."

"Note. The heir-at-law of the testator is his brother, I. H., the father of the devisee, T. H., whom the testator by his will constitutes *his heir*. The testator died a Roman Catholic, and seised of a real estate of considerable value.

"*Qu.* Whether T. H., the nephew and devisee, takes under the will any greater estate than an estate for life in the testator's real estate? Or will the express appointment by the testator in his will of said T. H. to be his heir, so operate as to give him an estate in fee?

"I. H. the heir-at-law of the testator, and father of the devisee, T. H., is willing to execute any deed, and thereby to convey to his son whatever interest he may have in the testator's real estate, so as to give his son an estate in fee.

"Please to advise, whether such a deed is necessary."

"Laying the circumstances of Mr. H.'s being a papist, or a person making profession of the popish religion, out of the case, I think, by the

Opinion.

IN FEE TO DEVISEE.

with heir's privity.

Preliminaries leading to confirmation.

tor] was seised at the time of his death, and is now in the actual possession thereof, and in the quiet and peaceable enjoyment of the rents and profits thereof; which possession and enjoyment is with the entire privity, approbation, and consent of said [*heir*], his father. But although it plainly appears, from the whole tenor of the said will, that it was the intention of the said testator thereby to give and devise unto said [*devisee*] an absolute estate of inheritance in fee simple of and in all the real estates whereof the said testator should die seised; *And* although it is apprehended that there are in the said will words of legal import and operation, sufficient to pass such an estate to the said [*devisee*], and that by virtue of the said will, he, the said [*devisee*], is become seised of or well entitled to the inheritance in fee simple, of and in all the real estates whereof the said [*testator*] was seised at the time of his death: *Yet* to obviate all doubts and difficulties which may arise, should a contrary construction at any time hereafter be contended for, and more particularly for facilitating the sale of the estates, should the said [*devisee*] hereafter be inclined to sell and dispose of the same, he the said [*devisee*] hath therefore applied to the said [*heir*] to ratify

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testator's giving him all his real and personal estate, and making him his heir, he has given to the said T. H. an estate in fee simple in all his lands, and the absolute property in all his personal estate. But if the said T. H., at the time of the devise, was a person making profession of the popish religion, he would, by the statute 11 & 12 Wm. 3, be disabled to take under that devise; such taking being a purchase within that act, and therefore absolutely made void thereby. But then the consequence would be, that, instead of the said T. H.'s taking the fee simple under the said will (which will would be a nullity in that case), such fee simple would descend to the testator's heir-at-law, who is Mr. I. H., the testator's elder brother, as I apprehend. And there being such a perfectly good understanding between the father and the son, as is stated in this case, I suppose there can be no danger of any other of the sons taking any advantage of their father, Mr. I. H.'s own incapacities under the said statute, by their conforming and becoming protestants; for the statute disables papists from having, during their lives, the benefit even of a descent, and gives the pernancy of the profits of the lands descended during their lives to the next protestant of kin: and so there is a temporary disability, even in the case of a descent. It might be right, in the present case, for

and confirm the said will, and the estate of inheritance in fee simple, thereby devised to said [*devisee*] of and in the said testator's real estates. AND the said [*heir*] being perfectly well satisfied that the said [*testator*], his late brother, was of sound and disposing mind, memory, and understanding, at the time of the making and publication of his said will; and that the same will was executed and attested in such manner as by law is required for devising real estates. AND the said [*heir*] being thoroughly convinced that it was the intention of the said testator to give and devise by his said will unto the said [*devisee*] an absolute estate of inheritance in fee simple of and in all the testator's real estates, he hath therefore most readily and willingly consented and agreed to ratify and confirm such an estate therein to the said [*devisee*], and to join in and execute any act or deed whatsoever for that purpose, and for establishing the will of the said [*testator*]. NOW THEREFORE THESE PRESENTS WITNESS, that, for effectuating the purposes aforesaid, and from the great regard which the said [*heir*] hath to the memory of his said late brother, and that his intention in the disposition of his real estates to the said [*devisee*] may not be defeated; and in considera-

IN FEE TO DEVISEE.

Testatum.

Mr. I. H. to let his right pass on to his son T. by descent at his death. However, it would not be amiss if Mr. I. H. should execute a deed, ratifying and confirming the estate to his son T., and covenanting not to do any thing during his life to impede or interrupt his son in having the full benefit of the lands devised, and letting his right thereto pass on to his son T. by descent. But, where papists are in danger of claims of this kind, the only very safe way is, to make sale of the lands with all convenient speed, and in the meantime to mortgage and incumber the same to protestant lenders for as much money as they can.

"JAMES BOOTH,
"Lincoln's Inn, 27th January, 1773."

Statement of the statutes as to the lands of papists.

By the 11 & 12 W. 3, c. 4, it was enacted, that, a person educated in the popish religion, or professing the same, who did not, in six months after the age of eighteen, take the oaths of allegiance and supremacy, and subscribe the declaration of the 30 Cha. 2, of their disbelief of the doctrine of transubstantiation, and their belief that the invocation of the saints, and the sacrifice of the mass, are idolatrous, should, in respect of himself only, and of his heirs or posterity, be disabled to inherit, or take lands by de-

IN FEE TO DEVISEE.

tion of the natural love and affection which the said [*heir*] hath for said [*devisee*], and in order to quiet and establish the seisin of the said [*devisee*] of and in all the real estates whereof the said [*testator*] was seised or possessed at the time of his death; and in order to ratify, confirm, and establish his said will, and also in consideration of five shillings of lawful money of Great Britain, by the said [*devisee*] to the said [*heir*], in hand well and truly paid at or before the sealing and delivery of these presents; the receipt whereof is hereby acknowledged; and for divers other good causes and valuable considerations him hereunto moving; *He* the said [*heir*], *hath* remised, released, ratified, and confirmed, and for ever quitted claim; *And* by these presents doth remise, release, ratify, confirm, and for ever quit claim unto said [*devisee*], his heirs and assigns, ALL and singular the real estates whereof the said [*testator*], or any person or persons in trust for him, was or were seised, possessed of, or interested in, or entitled to, at the time of *the death of the said [*testator*]. AND all the estate, &c. of the said [*heir*] of and in the said real estates, and every of them, and every part thereof. So that neither he the said [*heir*], his heirs or assigns, or any other person or per-

Confirmation.

Parcels.

All the estate.

[*490]

So that confirmor, and those claiming under

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scent, devise, or limitation, in possession, reversion, or remainder: and that during his life, till he took the oaths, and subscribed the declaration against popery, his next of kin, who was a protestant, should enjoy the lands, without accounting for the profits; and that every person professing the popish religion should be incapable of purchasing; and that all estates, terms, interests, or profits out of lands made, done, or suffered to his use, or in trust for him, should be void. By 3 Jac. 1, ch. 5; 1 W. & M. c. 26; 12 Anne, st. 2, c. 14, and 11 Geo. 2, c. 17, papists, or persons professing the popish religion, were disabled from presenting to advowsons† and other ecclesiastical benefices, and to hospitals, and other charitable establishments.

By a statute made in the second session of the 1st year of Geo. 1, c. 55,

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Papists sometimes indirectly present to a benefice.

† This part of the act still remains in force. [See stat. 10 Geo. 4, c. 7, s. 16.] However, it is often evaded; for, when a papist is possessed of an advowson, he generally conveys the next presentation to some protestant friend, *In trust* to present such person as the protestant shall think fit. When the living becomes vacant, the protestant presents the papist's nominee.

A jew may present to an advowson.

sons in trust for him or them, or in his or their name or names, or in the name, right, or stead of any of them, shall or will, can or may, by any ways or means hereafter, have, claim, challenge, or demand any estate, right, title, or interest, of, in, to, or out of the same real estates, or any of them, or any part thereof respectively. But that he the said [*heir*], his heirs and assigns, and every of them, from all estate, right, title, interest, property, claim, and demand, of, in, to, or out of the same real estates, or any of them, or any part thereof, are, is, and shall be by these presents for ever excluded and debarred (*b*). And the said [*heir*], for himself, his heirs, executors, and administrators, doth covenant, promise, and agree with and to the said [*devisee*], his heirs and assigns, that he will not do any act during his life

IN FEE TO DEVISEE.

him, may be for ever debarred.

Covenant that confirmor will not incumber:

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they were required to register their names and estates in the manner, and under the penalties therein mentioned; and by the 3 Geo. 1, c. 18, continued by several subsequent statutes, an obligation of enrolling their deeds and wills was imposed on them.

On the construction of the 11 & 12 W. 3, c. 4, it had been held, that, as it expressly confined the disability of papists to take by descent to themselves only, and preserved their heirs and posterity from its operation, it was not to be construed as preventing the vesting of the freehold and inheritance in them, in cases of descent, or transmitting them to their posterity: but that the disability respected only the pernancy of the profits, or beneficial property of the lands, of which it deprived them during their nonconformity. Whether that part of the statute which relates to their taking by purchase, should receive the same construction, was a frequent subject of discussion, the statute being, in that branch of it, without any limitation. To remedy this, the act of the 3 Geo. 1, c. 18, was passed: it enacts, that no sale for a full and valuable consideration by the owner, or reputed owner of any lands, or of any interest therein, theretofore made, or thereafter to be made to a protestant purchaser, shall be impeached, by reason of any disability of such papist, or of any person under whom he claims, in conse-

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(*b*) *Littleton* says, "it is a good and sure thing in every confirmation to have these words: *to have and to hold* the tenements, &c. in fee, or in fee tail, or for term of life, or for term of years, according as the case is, or the matter lies." Litt. s. 523. Lord *Coke* adds, "this is good counsel, and worthy to be observed." Co. Litt. 298 b. However, an *habendum* is not indispensable in a confirmation.

A confirmation may be either with or without an *habendum*.

IN FEE TO DEVISEE.

for further assurance.

to incumber, &c. AND FURTHER, that he the said [*heir*] shall and will, at any time or times hereafter, upon the request of the said [*devisee*], his heirs or assigns, &c. (*for further assurance*). IN WITNESS, &c., (*ut ante*, Vol. 2, p. 507).

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quence of the 11 & 12 W. 3, unless the person taking advantage of such disability shall have recovered before the sale, or given notice of his claim to the purchaser, or, before the contract for sale, shall have entered his claim at the quarter sessions, and *bonâ fide* pursued his remedy. The act then recites the clauses of the 12 & 13 W. 3, disabling papists from purchasing; and afterwards enacts, that these clauses shall not be thereby altered or repealed, but shall remain in full force. This proviso is couched in such general words, that it created a doubt in some, whether it did not nearly frustrate the whole effect of the act. To this it was answered, that, notwithstanding the proviso, the enacting part of the statute was in full force for the benefit of a protestant purchaser; and that the proviso operated only to declare, that papists themselves should not derive any benefit from the act in any purchases they should attempt to make under the foregoing clauses. This was considered the better opinion, and, on the authority of it, many purchases of considerable consequence were made. See also 6 Geo. 2, c. 5.

Statutes for the relief of papists.

By the 18 Geo. 3, c. 60, it was enacted, that so much of the 11 & 12 W. 3, as related to the prosecution of popish priests and jesuits, and imprisoning for life papists who keep schools, or to disable papists from taking by descent or purchase, should be repealed, as to all papists or persons professing the popish religion claiming under titles not thentofore litigated, who, within six months after the act passed, or their coming of age, should take the oath thereby prescribed. The 31 Geo. 3, c. 32, repeals the laws requiring the deeds and wills of Roman Catholics to be registered or inrolled. Butler n. Co. Litt. 391, a. See also 43 Geo. 3, c. 30; *et ante*, Vol. 2, p. 187-8.

Statute 10 Geo. 4, c. 7.

[By the late important "Act for the relief of his Majesty's Roman Catholic subjects," 10 Geo. 4, c. 7, it is enacted, sect. 23, "that from and after the passing of this act, no oath or oaths shall be tendered to, or be required to be taken by his majesty's subjects professing the Roman Catholic religion, *for enabling them to hold or enjoy any real or personal property*, other than such as may by law be tendered to and required to be taken by his Majesty's other subjects." The oath required by the act to be taken by Roman Catholics, is merely to qualify them to vote at elections, sit in parliament, hold office under the crown, &c.]

CONFIRMATION, RELEASE IN FEE, AND ASSIGNMENT ON TRUSTS FOR SALE.

CONFIRMATION *by the Heir-at-Law of a Devisee in Fee:* RELEASE *in Fee by the Heir-at-Law and the other Children of the Testator, all beneficially interested under the Will; and* ASSIGNMENT *by all of them of Leaseholds,* Upon trust *to sell the Lands, when the Youngest Child comes of Age, at which time she is to execute the Deed; with a partial* POWER OF PRE-EMPTION *to the Heir-at-Law, and* ADMISSION *by the other Children that some Lands interlined in the Will did not pass thereby; but descended to the Heir-at-Law.*

THIS INDENTURE, made the —— day of ——, in the year of our Lord one thousand eight hundred and ——; BETWEEN [*heir*], of &c., esquire, the eldest son and heir-at-law of [*testator*], late of —— aforesaid, clerk, deceased, of the first part; the said [*heir*], party hereto (*a*), and [*daughter*], spinster, [*daughter*], spinster, [*son*], solicitor, and [*infant daughter*], spinster, all of —— aforesaid, the other children of the said [*testator*], deceased, and which [*infant daughter*] is to execute these presents after she shall have attained her age of twenty-one years, of the second part: [*widow*], of —— aforesaid, widow, heretofore ——, the widow of the said [*testator*], deceased, [*another trustee*], of ——, in the county of ——, clerk, and [*the other surviving trustee*], of ——, in the county of ——, * esquire, (the surviving devisees in trust named in the last will and testament of the said [*testator*], deceased), of the third part. WHEREAS the said [*testator*], deceased, by his last will and testament in writing, bearing date on or about the —— day of ——, one thousand eight hundred and ——, gave unto the said [*widow*], [*other trustee*], [*deceased trustee*], since deceased, and the said [*other surviving trustee*], *All* his freehold messuage and lands at

Parties.

Infant to execute when of age.

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Recital of devise in fee, and for lives,

(*a*) "Party hereto," because the heir's and his father's christian and surnames were the same. "Party hereto.

CONFIRMATION, RELEASE IN FEE, AND ASSIGNMENT ON TRUSTS FOR SALE.

——, in the said county of ——, with the appurtenances respectively thereunto belonging; *And also* all his freehold tenement and garden, with their appurtenances, at ——, in the county of ——; *And also* all his freehold tenements, orchards, and garden, with the appurtenances thereunto belonging, at ——, in the county of ——, then late his brother Peter's, and known by the name of ——; *And also* all his freehold piece of land or field, then lately purchased of John Jones, lying and being in the said parish of ——; *And also* all the reversion in fee of all that messuage, orchard, and garden, and also a field called —— close, likewise an orchard called ——, with the fruit trees, timber, and appurtenances, thereunto belonging; *And also* all that lifehold messuage or tenement, orchard, and garden then late ——, with their appurtenances, situate also at —— aforesaid: *To hold* to them, their heirs, executors, administrators, and assigns, respectively, *Upon the trusts*, and to and for, and upon the several uses, intents, and purposes therein and hereinafter mentioned: that is to say;

to trustees,

In trust to pay rents for the maintenance of children, until youngest comes of age:

In trust to receive and pay, and apply the rents, profits, and proceeds of his said real and lifehold estate, and also the reversions in fee aforesaid, or such part thereof as might be necessary, unto and for the equal maintenance and education of his five children, namely, the said [*all his before-named children*], and such other child or children as he might thereafter have by his said wife, either born in his life-time, or within ten months after his decease, during their respective minorities; and also until the youngest child then born, or to be born as aforesaid, should have attained the age of twenty-one years, if he or she should so long live. *And* the testator declared his will to be, that, if the said trustees should think it necessary, they

[*194] might and * should apply part of the principal (*b*) of his real or lifehold estate, for the maintaining, educating, apprenticing, or placing out, or otherwise for the benefit of all or any, or either of his said children; provided the money so applied should not exceed the equal share of such child or children for whose use the same should be respectively applied. *And* when and as soon as the youngest children

when the youngest child attain-

(*b*) This is a very informal clause, for it does not state how the trustees are to raise the money.

should have attained the age of twenty-one years, *To the use* of, and in trust for his several children then born, or to be born as aforesaid, their heirs, executors, administrators, and assigns, to be lawfully conveyed to them respectively in equal proportions, as tenants in common. *And* it was by the said testator in his said will provided, that, if any or either of his said children should die under the age of twenty-one years, or before the youngest should have attained the age of twenty-one years as aforesaid, without leaving any issue of his, her, or their body or bodies, then the said testator willed, that the share or shares of him, her, or them so dying, should go over and be to and for the use and benefit of the survivor or survivors of them, their heirs, executors, administrators, and assigns respectively, in equal proportions if more than one; *And* if all his children but one should die before attaining the age of twenty-one years, unmarried and without issue as aforesaid, then the whole to and for the sole use and benefit of such one survivor, his or her heirs, executors, administrators, and assigns; subject however, in that case, to the payment of one hundred pounds apiece to two of the testator's sisters, namely, [——] and [——]. *And* in the said will are several other limitations over of the said lands, hereditaments, and premises, in case all the said testator's children should die before attaining the said age of twenty-one years, unmarried and without leaving issue. *And* the said testator appointed the said [*trustees*] joint executors of his said will. *And* the said testator signed, sealed, published and declared his said last will and testament, in the presence of three competent witnesses, who subscribed their respective *names to the said will, in the presence of the said testator and of each other. And whereas after the execution of the said will, the said [*testator*], deceased, settled and assured the said freehold tenement and garden, with their appurtenances, situate at —— aforesaid, upon and for certain trusts, ends, intents, and purposes, for the benefit of the said [*widow*], and the said [*heir*], party hereto, [*the other children*], or some or one of them. And whereas, in or about the latter end of the year one thousand eight hundred and ——, the said [*testator*], deceased, purchased of [A. B.] *All those* freehold lands and fields, containing

ed 21, to be conveyed to the children as tenants in common;

with benefit of survivorship if any died before time of vesting, without issue:

and if only one child, then the whole to that one,

subject to 200*l.*, for testator's sisters;

with several other limitations, if all his children died without issue.

Appointment of executors:

execution of will:

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that subsequently testator settled by deed part of the premises devised:

that testator purchased other lands,

and by an interlineation in his will, intended to give them to his trustees upon the said trusts;

—— acres, more or less, in, &c.; and by an interlineation (*c*) in his said will, he intended, or expressed an intention to give the last-mentioned lands, hereditaments, and premises unto his said trustees, their heirs, executors, administrators, and assigns, upon the same trusts as are in the said will declared of and concerning his other lands, hereditaments and premises; but in consequence of there not being any evidence that the said testator republished his said will after the said interlineation, * the said lands, hereditaments, and premises, called [B.'s], are supposed to have descended to the said [——], party hereto, as his heir-at-law, exempt from the provisions of the said will.

but there being no evidence that testator republished his will, those lands descended to the heir-at-law:

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death of testator, and proof of will:

And whereas the said testator [——] departed this life on or about the —— day of ——, one thousand eight hundred and ——; and on or about the —— day of ——, one thousand eight hundred and ——, the said [*three surviving executors*] duly proved the said will in the Prerogative Court of Canterbury.

preliminary recital to heir's agreement to confirm.

And whereas the said [*heir*], party hereto, being satisfied that the said [*testator*], deceased, his father, was, at the time of making and publishing his said will, of sound and disposing mind, memory,

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Case and opinion on the above devise.

(*c*) The testator having purchased an estate, he obliterated the words "To have and to hold to them, their heirs, executors, administrators," being the last line of the first sheet of his will, and on the other side of the same sheet made a continuation of his will, by inserting the newly purchased estate, and also the above words, "to have and to hold," &c. No person was present when he made this alteration and addition.

On a case for opinion, "whether, and how far, the will, as originally made, was revoked by the obliteration and addition?" the following opinion was given.

"Although a testator may alter his will by *cancelling* or *obliterating* part of it, without any subscribing or attesting witness, yet he must so cancel or alter those parts of the will *animo revocandi*. *Short* v. *Smith*, 4 East, 419. Whether the obliterated parts of this will (being the *habendum*) can or cannot, under the circumstances, be read as part of the will, yet on the will as it stands, (even admitting the cancellation or obliteration to be effectual), there is sufficient language in the will to carry the fee as effectually as if the *habendum* had remained part of the will; for the nature of the trusts require that the trustees should have the fee, so that in effect there is not any alteration in the will, either by the addition or by the cancellation."

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and understanding; and that the said will was signed, sealed, published, and declared by him in the presence of the said witnesses, and attested by them in the presence of the said testator; and being also desirous that the said will as originally made on the said —— day of ——, one thousand eight hundred and ——, and before such interlineation, should be operative and effectual, he the said [*heir*], party hereto, hath agreed to confirm the said will, on the terms that the said [*other children*] should join with him in the grant, release, and confirmation hereinafter contained. NOW THIS INDENTURE WITNESSETH, that, to the intent and purpose aforesaid, and in consideration of the sum of five shillings of lawful money of Great Britain and Ireland to the said [*heir*], party hereto, paid by the said [*three trustees*], at or before the sealing and delivery of these presents; the receipt whereof is hereby acknowledged; and for divers other good causes and considerations the said [*heir*] (*d*), party hereto, thereunto moving, he, the said heir, party hereto, *hath* ratified, confirmed, and established; *And* by these presents *doth*, for himself and his heirs, in all things ratify, confirm, and establish THE said recited will of the said [*testator*], deceased; and all the devises, bequests, and limitations, directions, and appointments thereby made, or therein contained, according to the purport, true intent, and meaning * thereof, as the same was originally made as hereinbefore in part recited on the said —— day of ——, one thousand eight hundred and ——; *But* not in anywise the intended devise of the said estate purchased of [A. B.], which they the said [*all the other children*] do, and each of them doth hereby admit and acknowledge descended and came to the said [*heir*], party hereto, as the heir-at-law of the said [*testator*], deceased, exempt from the provisions of the said will. AND THIS INDENTURE FURTHER WITNESSETH, that, for the ends, intents, and purposes aforesaid, and in pursuance of the said agreement; and in consideration of five shillings of lawful money aforesaid, to each of them the said [*heir*], party hereto, [*the other child-*

First testatum. Confirmation of will as originally made.

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but not the intended devise of the subsequently purchased lands, which all the other children admit descended to the heir-at-law.

Second testatum Release in fee five to three.

(*d*) If the heir-at-law has a wife, she would join with him in a fine of the lands. Fine.

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ren], paid by the said [*three trustees*] at or before the sealing and delivery of these presents; the receipt whereof respectively is hereby acknowledged; and for divers other good causes and considerations, the said [*heir*], party hereto, [*the other children*], thereunto moving, *They* the said [*heir*], party hereto, [*the other children*], according to their respective shares, estates, rights, and interests in the premises, but no further or otherwise, *have*, and each and every of them *hath* granted, bargained, sold, released, and confirmed; *And* by these presents *do*, and each and every of them *doth*, grant, bargain, sell, release, and confirm unto the said [*three trustees*], (in the actual possession (*e*) of the said [*three trustees*], now being by virtue of a bargain and sale thereof made to them by the said [*heir*], party hereto, [*the other children*], in consideration of five shillings paid to each of them by the said [*three trustees*], by indenture bearing date on the day next before the day of the date, and executed before the execution of these presents, for one whole year, to be computed from the day next before the day of the date of the same indenture of bargain and sale, and by force of the statute made for transferring uses into possession), and to their heirs, ALL THOSE the said freehold messuage and lands at ——, in the said county of ——, with the appurtenances respectively thereunto belonging; AND ALSO ALL THOSE the said free-

(Reference to bargain and sale for a year).

Parcels.

[*198] *hold tenements, orchards, and garden, with the appurtenances thereto belonging, situate at ——, in the county of ——, and known by the name of ——; AND ALSO ALL THAT the said freehold piece of land or field heretofore purchased by the said [*testator*], deceased, of John Jones, lying and being in the said parish of ——; AND ALSO ALL THAT messuage, orchard, and garden, and also a field, called —— close; AND ALSO an orchard, called ——, with the fruit trees, timber, and appurtenances thereunto belonging, situate at —— aforesaid; AND ALSO ALL and singular other the hereditaments and premises whereof or wherein the said [*testator*], deceased, or any person or persons to or for his use, or in trust for him, was, both at the time of making his said will, on the said —— day of

Sweeping clause.

(*e*) *Vide ante*, Vol. 2, p. 97; *ante*, p. 161.

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——, one thousand eight hundred and ——, and continued at the time of his decease, seised, possessed of, or interested in, or entitled to, for any estate of inheritance or freehold, and respectively situate in the said counties of —— and ——, or any of them; and which, in and by his aforesaid will, were given and devised, or were intended to be given and devised to the said [*trustees*], their heirs and assigns: AND all and singular houses, outhouses, edifices, buildings, barns, stables, dove-houses, orchards, gardens, backsides, privileges, profits, commodities, emoluments, and hereditaments whatsoever to the said messuages, lands, hereditaments, and premises hereby released, or otherwise assured, or intended so to be, belonging, or in any wise appertaining, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof: AND the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of the same messuages, lands, hereditaments, and premises, and of every part thereof: AND all the estate, right, title, interest, property, claim, and demand whatsoever, at law or in equity, of them the said [*heir*], party hereto, [*the other children*] respectively, and of each and every of them, of, in, to, or out of the same messuages, lands, hereditaments, and premises, every or any part of parcel thereof. TO HAVE AND TO HOLD the said messuages, lands, hereditaments, and premises, and all and singular other the premises hereby *released, or otherwise assured, or intended so to be, with their, and every of their rights, members, and appurtenances, unto the said [*three trustees*] and their heirs: TO THE USE of the said [*three trustees*], their heirs and assigns: *Nevertheless*, UPON THE TRUSTS (*f*), and for the ends, in-

General words.

Reversion, &c.

All the estate.

Habendum to the use of three trustees in fee;

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upon trusts hereinafter declared.

(*f*) ON USES AND TRUSTS.

On uses and trusts.

I. *What uses are executed into legal estates by the statute of Uses, and what not.*

II. *On conveyances operating by transmutation of possession.*

III. *Under powers.*

IV. *On conveyances not operating by transmutation of possession.*

V. *As to rents.*

VI. *What uses are executed by the statute on devises*

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Third testatum.

tents, and purposes, and subject to the several provisoes, declarations, and agreements hereinafter expressed, declared and contained, or referred to, of and concerning the same. AND THIS INDENTURE FURTHER WITNESSETH, that, for the considerations aforesaid, *They*,

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VII. *Where it is requisite the legal estate should be in the trustees.*

1st. *In devises:*

2nd. *In deeds.*

VIII. *Where in the person beneficially interested.*

IX. *Estates for years are not within the statute, and therefore not executed, unless created anew out of a freehold estate.*

X. *Copyholds are not within the statute.*

The statute of Uses, 27 Hen. 8, has the following words concerning the execution of the Use:

How by the common law lands ought to be transferred from one person to another.

"Where, by the common laws of this realm, lands, tenements, and hereditaments be not devisable by testament, nor ought to be transferred from one to another, but by solemn livery and seisin, matter of record, writing sufficient made *boná fide*, without covin or fraud; yet, nevertheless, divers and sundry imaginations, subtle inventions, and practices, have been used, whereby the hereditaments of this realm have been conveyed from one to another by fraudulent feoffments, fines, recoveries, and other assurances craftily made to secret uses, intents, and trusts; and also by wills and testaments, sometime made by *nude parolx* and words, sometime by signs and tokens, and sometime by writing, and for the most part made by such persons as be visited with sickness, in their extreme agonies and pains, or at such time as they have scantly had any good memory or remembrance; at which times they, being provoked by greedy and covetous persons lying in wait about them, do many times dispose indiscreetly and unadvisedly their lands and inheritances; by reason whereof, and by occasion of which fraudulent feoffments, fines, recoveries, and other like assurances to uses, confidences, and trusts, divers and many heirs have been unjustly at sundry times disherited, the lords have lost their wards, marriages, reliefs, harriots, escheats, aids *pur fair fitz chivalier, & pur file marier*, and scantly any person can be certainly assured of any lands by them purchased, nor know surely against whom they shall use their actions or executions for their rights, titles, and duties; also men married have lost their tenancies by the curtesy, women their dowers, manifest perjuries by trial of such secret wills and uses have been committed; the king's highness hath lost the profits and advantages of the lands of persons attainted, and of the lands craftily put in feoffments to the uses of aliens born, and also the profits of waste for a year and a day of lands of felons attainted, and the lords their escheats thereof; and many other in-

Several inconveniencies ensuing by conveyance of lands to uses, and by the devising them by wills.

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the said [*heir*], party hereto, [*the other children*], *have*, and each and every of them *hath* granted, bargained, sold, and assigned; *And* by these presents *do*, and each and every of them *doth* grant, bargain, sell, and assign unto the said [*three trustees*], their executors, administrators, and assigns, ALL THAT leasehold messuage or tenement, orchard and garden, heretofore ——, situate at ——, aforesaid, with their appurtenances: AND all the estate, right, title, interest, benefit of renewal, term of years and time, use, trust, possession, property, profit, claim, and demand

Assignment of leaseholds for years, five to three.
Parcels:
All the estate.

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conveniences have happened, and daily do increase among the king's subjects, to their great trouble and inquietness, and to the utter subversion of the ancient common laws of this realm; for the extirping and extinguishment of all such subtle practised feoffments, fines, recoveries, abuses, and errors heretofore used and accustomed in this realm, to the subversion of the good and ancient laws of the same, and to the intent that the king's highness, or any other his subjects of this realm, shall not in anywise hereafter by any means or inventions, be deceived, damaged, or hurt, by reason of such trusts, uses, or confidences:" It may please the king's most royal majesty, that it may be enacted by his highness, by the assent of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority of the same, in manner and form following; that is to say, that where any person or persons stand or be seised, or at any time hereafter shall happen to be seised, of and in any honours, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments, to the use, confidence, or trust of any other person or persons, or of any body politic, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise, by any manner,* means whatsoever it be; that, in every such case, all and every such person and persons, and bodies politic, that have or hereafter shall have any such use, confidence, or trust, in fee simple, fee tail, for term of life or for years, or otherwise, or any use, confidence, or trust, in remainder, or reverter, shall from henceforth stand and be seised, deemed and adjudged in lawful seisin, estate, and possession of and in the same honours, castles, manors, lands, tenements, rents, services, reversions, remainders, and hereditaments, with their appurtenances, to all intents, constructions, and purposes in the law, of and in such like estates, as they had or shall have in use, trust, or confidence of or in the same; and that the estate, title, right, and possession that was in such person or persons that were, or hereafter shall be seised of any lands, tenements, or hereditaments, to the use, confidence, or trust of any such person or persons, or of any body politic, be from henceforth clearly

The possession of lands shall be in him or them that have the use.

* *sic.*

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Habendum to the trustees for the terms therein:

whatsoever, both at law and in equity, of them the said [*heir*], party hereto, [*the other children*], of, in, to, or out of the said leasehold premises. To HAVE AND TO HOLD the said leasehold premises, and all and singular other the premises hereby assigned, or mentioned or intended so to be, and every part and parcel thereof, with their and every of their appurtenances unto the said [*three trustees*], their executors, administrators, and assigns, henceforth, for and during the term or terms of years, and other chattel interests for which the same premises are now held under or by vir-

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deemed and adjudged to be in him or them that have, or hereafter shall have, such use, confidence, or trust, after such quality, manner, form, and condition as they had before in or to the use, confidence, or trust, that was in them."

Assurance made of divers to the use of one or some of them.

Sect. 2. "And be it further enacted by the authority aforesaid, That where divers and many persons be, or hereafter shall happen to be, jointly seised of and in any lands, tenements, rents, reversions, remainders, or other hereditaments, to the use, confidence, or trust of any of them that be so jointly seized, that, in every such case, that those person or persons which have or hereafter shall have any such use, confidence, or trust, in any such lands, tenements, rents, reversions, remainders, or hereditaments, shall, from henceforth, have, and be deemed and adjudged to have, only to him or them that have, or hereafter shall have, any such use, confidence, or trust, such estate, possession, and seisin, of and in the same lands, tenements, rents, reversions, remainders, and other hereditaments, in like nature, manner, form, condition, and course, as he or they had before in the use, confidence, or trust, of the same lands, tenements, or hereditaments; saving and reserving to all and singular persons, and bodies politic, their heirs and successors, other than those person or persons which be seised, or hereafter shall be seised, of any lands, tenements, or hereditaments, to any use, confidence, or trust, all such right, title, entry, interest, possession, rents, and action, as they or any of them had, or might have had before the making of this act."

Saving of the rights of strangers.

Sect. 3. "And also saving to all and singular those persons, and to their heirs, which be, or hereafter shall be seised to any use, all such former right, title, entry, interest, possession, rents, customs, services, and action, as they or any of them might have had to his or their own proper use, in or to any manors, lands, tenements, rents, or hereditaments whereof they be, or hereafter shall be, seised to any other use, as if this present act had never been had nor made; any thing contained in this act to the contrary notwithstanding."

Sections 4 and 5 of the statute, concerning rents, are inserted *ante*, Vol. 1, p. 603.

tue of any estate or estates, interest or interests, which the said testator had therein at his death: *Nevertheless*, UPON THE TRUSTS, and for the ends, intents, and purposes, and subject to the several provisoes, declarations, and agreements hereinbefore referred to, and hereinafter expressed, declared, and contained of and concerning the same: that is to say; AND *it is hereby expressly declared and agreed*, by and between the parties hereto, as far as they respectively are interested, that the said [*three trustees*], their heirs, executors, administrators, and assigns respectively,

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upon the trusts hereinafter declared.

Declaration of trust of freeholds and leaseholds; namely;

Sections 6, 7 and 9, concerning jointures, are inserted *ante*, Vol. 2, p. 489.

Sect. 1. "And be it enacted by authority aforesaid, that all and singular person and persons, and bodies politic, which at any time on this side the said first day of May, which shall be in the year of our Lord God, 1536, shall have any estate unto them executed of and in any lands, tenements, or hereditaments, by the authority of this act, shall and may have and take the same or like advantage, benefit, voucher, aid, prayer, remedy, commodity, and profit, by action, entry, condition, or otherwise, to all intents, constructions, and purposes, as the person or persons seised to their use of or in any such lands, tenements, or hereditaments, so executed, had, should, might, or ought to have had at the time of the execution of the estate thereof, by the authority of this act, against any other person or persons, of or for any waste, disseisin, trespass, condition broken, or any other offence, cause, or thing concerning or touching the said lands or tenements so executed by the authority of this act."

Cestui que use may take all such advantages as his feoffees might have had.

I. In all conveyances deriving their effect from the statute of uses, the seisin upon which the use arises, must be co-extensive with the use: for if lands be given to A. and B. during their lives, to the use of C.; if A. and B. die, C.'s estate is determined, for the seisin to serve the use which A. and B. had, was only for their lives, and the execution of it in C. cannot make the estate larger. Gilb. Uses, 66, 229. So, if in a conveyance to A., omitting, "and his heirs," to the use of B., his heirs and assigns, the use is only executed for the life of A. When uses are to be declared on the seisin of a releasee or feoffee, the conveyance should be to him and his *heirs*, and not to him, his heirs and assigns; for, as he is only a conduit-pipe through whom the uses are to arise, his momentary seisin is not capable of being assigned, and therefore the word "assigns" is useless. So, if A., tenant for life, bargain and sell, or covenant to stand seised to the use of B. in fee, B. only acquires an estate *pour autre vie*.

What uses are executed into legal estates by the statute of uses, and what not.

In all conveyances operating under the statute of uses, it is only the

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shall henceforth stand seised and be possessed of the said messuages, lands, hereditaments, and premises hereby released and assigned, or otherwise assured, or intended so to be, with their and every of their rights, members, and appurtenances, UPON TRUST that they the said [*three trustees*], and the survivors and survivor of them, his or her heirs, executors, administrators, and assigns, do and shall, from time to time, until the said [*infant child*] shall attain the age of twenty-one years, or die under that age, pay and apply the rents, profits, and proceeds of the said messuages,

Upon trust until an infant child shall attain 21, or die under, to apply the rents and profits for the children's equal benefit:

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first use which is executed into a possession, or that draws the seisin of the feoffee or releasee to it, by virtue of the instantaneous operation of the statute; because there cannot be any use declared on that possession which is created by the statute; or, in other words, there cannot be a use upon a use, (Lord Bacon's reading on the statute of Uses, 43; Tracts, 335, 2d ed. *Tyrrell's* case, Dyer, 155 a; Gilb. Uses, 161), arising from that seisin which is transferred by the statute: and if there be any ulterior use declared, it will be only an equitable estate.

The reason why there cannot be a use on a use is, that when the statute has executed the use in the first degree, it has exhausted its power, and cannot operate any further; for the words of the statute are, "where any person or persons shall be *seised* to the use, confidence, or trust of any other person or persons, &c." and therefore, on a release, or any other conveyance, operating by transmutation of the possession to A. to the use of B. to the use of C.; or on a conveyance not operating by transmutation of the possession, as, on a covenant by A., to stand seised to the use of B. to the use of C.; or a bargain and sale by A. to the use of B. to the use of C.; A. in each case, and not B., is seised by the rules of the common law; B. has no *seisin* whatever independently of the statute, and by giving B. that seisin, the statute is *functus officio.*

However, the doctrine that a use cannot be on a use, has been made, as Mr. Rowe very justly observes, Bac. Uses, 134, the subject of much intemperate, though impotent censure, by Mr. Watkins, Princ. Conv. Introduc. xi. xii. 2d ed.

The rule may be thus exemplified, for the purpose of shewing *what uses are, and what uses are not, executed by the statute.*

On conveyances operating by transmutation of possession.

II. If upon those conveyances, operating by transmutation of possession; Noy's Tenures, 95; viz. a fine, recovery, feoffment, lease at common law, or bargain and sale for a year, and a release in enlargement, the use be

lands, hereditaments, and premises hereby released and assigned, or otherwise assured, or intended so to be, when, and as, or after the same shall be received, unto and for the equal maintenance and education of the said [*heir*], party hereto, [*the other children*]: AND when and after the said [*infant child*] shall attain the age of twenty-one years, or die under that age, UPON TRUST that they, the said [*three trustees*], or the survivors or survivor of them, his or her heirs, executors, administrators, or assigns, of their, his, or her own proper authority (*g*), and without

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and when infant shall attain 21, or die under; general trusts for sale:

declared on the seisin of A. the conuzee, demandant or recoverer, feoffee, or releasee, to the use of A.: or unto and to the use of A.: he is in by the common law, and not by the statute. *Samme's* case, 13 Co. 56; *Long* v. *Buckeridge*, 1 Str. 106, 111; *Gwam & Ward* v. *Roe*, 1 Salk. 90; Gilb. Rep. 16, 17; 2 Cas. & Opin. 281. The reason of which is, that, whenever an estate may take effect either by the rules of the common law, or by the statute of uses, the common law is preferred: and notwithstanding A. is in by the common law, and the use limited to him is so far of no effect, yet that intervening use prevents the statute attaching on any ulterior use; and so far it has effect, that if, in either of the above cases, a use in the second degree had been limited to B., he would have taken only an equitable estate. *Girland* v. *Sharp*, Cro. Eliz. 382; *Attorney-General* v. *Scott*, Cas. Temp. Talb. 139; [*Doe* d. *Lloyd* v. *Passingham*, 6 Barn. & Cress. 305]. So also, if, on the seisin of A., the use be declared to B. to the use of C., the use to B. is executed into legal estate, and the use to C. gives him only an equitable estate. So, if, on the seisin of A., the use be declared to the use of A., or unto and to the use of A., or to the use of B., *to the uses*, intents, &c., hereinafter mentioned, these uses, in the second degree, will be mere trusts; and if these ulterior uses contain a power to appoint the lands, the appointee, under such a power, will only have an equitable estate. So, where A. made a settlement by deed and fine, to the use of himself and his heirs, until his then intended marriage, and afterwards to the use of his wife for life, and after her death *to the use* of the cognizees in the fine, and their heirs during the life of A., upon trust to permit him to receive and take the rents and profits, remainder to the first and other sons of the marriage, &c.; remainder to the use of the heirs of the body of A.; it was adjudged by the whole Court, that A. took only a trust estate for life, because the use to him could not execute upon the use which was limited to the trustees for his life; and

(*g*) Under trusts for sale similar to the above, the trustees can convey a good title to the purchaser without the concurrence of the beneficial owners. *Vide ante*, Vol. 1, p. 569, (*e*).

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any further consent or concurrence of the said [*heir*], party hereto, [*the other children*], or any or either of them, or any or either of their heirs, executors, administrators, or issue, as soon as conveniently may be, do and shall make sale, and absolutely dispose of the said messuages, lands, hereditaments, and premises hereby released and assigned, or otherwise assured, or intended so to be, with their and every of their rights, members, and appurtenances, either altogether and in one lot, or by parcels and in several lots, and either by public auction or private contract, or partly

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consequently the legal estate for his life was executed in them by the statute of uses, and that the limitation to the heirs of the body of A. was a contingent remainder, and such as the heir would take by purchase, and not by descent. *Tippin* v. *Cosin*, Carth. 272; Comb. 312, 313; 1 Lord Raym. 33; 4 Mod. 380. So, where the uses of a fine were declared to the use of the husband for life, remainder to the use of trustees and their heirs for the life of the husband, in trust to support contingent remainders, remainder to the use of the wife for life, remainder to the use of the trustees and their heirs (omitting for the life of the wife), in trust to support the contingent uses and estates thereinafter limited from being defeated or destroyed, and for that purpose to make entries and bring actions, as occasion should require, but nevertheless to permit the wife and her assigns to receive the rents, &c.; and after the several deceases of husband and wife, *to the use* of the first and other sons of the marriage in tail, &c., remainder to such uses as the wife should appoint, remainder to the use of the right heirs of the wife in fee: the use to the trustees subsequent to the estate for life of the wife being in fee, all the ulterior uses were mere trusts. *Venables* v. *Morris*, 7 Durnf. & East, 342.

Under powers.

III. As estates created under *powers* deriving their effect from the statute of uses, are uses arising from the seisin of the feoffees, releasees, &c. in the conveyances giving the powers, and are to be construed in the same manner as if the estates created under the powers were limited by or contained in the conveyances giving the power: therefore such an appointment to A. to the use of B. executes the use in A., giving him the legal possession under the statute, and B. has only an equitable estate. But under an authority deriving its effect from the principles of the common law, where the donee of the power has no seisin of the estates, as in the case of a bargain and sale, under a bare power to executors to sell, where the estate is not devised to them, and the inheritance descends to the heir; Noy's Maxims, 229, (c); Co. Litt. 113 a; or under a bargain and sale by the Remembrancer of the Court of Exchequer, of land extended for a

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by public auction and partly by private contract, as they, he, or she, in their, his, or her discretion, shall think fit, with full liberty, if they or he should think fit and requisite, to buy in the said hereditaments, or any part or parts thereof, and to rescind any contract or contracts for sale thereof, or any part or parts thereof, and re-sell the same at any future auction, or by private contract, with such liberty as last mentioned, without being liable to answer for any loss or diminution in price by such re-sale, and convey the same hereditaments and premises, when sold, to

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crown debt, by virtue of 25 Geo. 3, c. 35; or a bargain and sale under the land-tax acts; in each of which cases the bargainee has a common-law seisin, and a use may be declared on it, which will be executed into a legal possession by the statute of uses. Sug. Pow. 1, 196, 2nd ed. Sug. Gilb. Uses, 351.

Some conveyances operate partly by the rules of the common law, and partly by the statute of uses: as, for example, the usual limitation to prevent dower, on the seisin of A. the purchaser, to the use of such person, &c. as A. shall appoint; and, in default of appointment, to A. for life, remainder to B. the trustee, and his heirs, during A.'s life, in trust for A., remainder to A. in fee: A.'s estate for life, and the fee limited to him in default of appointment, take effect by the rules of the common law, independently of the statute; but the limitation to B. is executed by the statute, and the ulterior trust for the life of A. is neither affected by the common law, nor by the statute, but is a Chancery trust; and so also when A. exercises his power of appointment, the appointee is in by the statute under the learning of shifting uses. The reasons why A. cannot be seised to the use of himself are, because a man could not be a trustee for himself before the statute of uses; and the words of the statute are "where any person or persons shall be *seised* to the use, confidence, or trust of any *other* person or persons, &c.:" and Lord Bacon says, the whole scope of the statute was to remit the common law, and never to intermeddle where the common law executed an estate; therefore, he adds, the statute ought to be expounded, that, where the party seised to the use, and the *cestui que use* is one person, he never takes by the statute, *except* there be a direct impossibility or impertinency for the use to take effect by the common law. Bacon on Uses, 63; Law Tracts, 352, 2nd ed. As, if A. enfeoff B. in fee to the use of B. in tail, and then to the use of C. in fee; or, if A. covenant to stand seised to the use of himself in tail, and to the use of his wife in fee; in both these cases the estate tail is executed by the statute; *first*, in favour of the issue in tail, *Samme's* case, 13 Co. 56; and,

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the person or persons who shall agree to become the purchaser or purchasers thereof, and his, her, or their heirs, executors, administrators, or assigns; or to such uses, and upon such trusts, as such purchaser or purchasers, his, her, or their heirs, executors, administrators, or assigns shall direct or appoint. AND UPON THIS FURTHER TRUST, that they the said [*three trustees*], and the survivors and survivor of them, and the heirs, executors, administrators, and assigns of such survivor, do and shall, by, with, and out of the clear rents, issues, and profits of the said here-

and out of rents before sale and purchase monies,

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secondly, because an estate tail cannot be re-occupied out of a fee simple, being a new estate, unknown to the common law, created by the statute *de donis*, and not like a particular common-law estate for life or years, which are but portions of the absolute fee, and are disposable by the owner in like manner, without any restriction. But if A. enfeoff B. in fee, to the use of C. for life, and then to the use of B. in fee, B. is in of the fee simple, merely in course of possession, and as of a reversion, and not of a remainder: Co. Litt. 22 b: but Lord *Bacon* says, the law would be contrary, if A. enfeoff B. in fee to the use of C. for life, then to the use of B. for life, with remainder to the use of D. in fee; as the law will not admit fraction of estates, B. is in with the rest by the statute. Bacon on Uses, 64; Law Tracts, 353, 2nd ed. However, the last proposition is questionable, and it is contrary to his Lordship's reasoning in the preceding page.

So, where A. by lease and release conveyed lands to C. and D. and their heirs, to hold to them, their heirs and assigns, as tenants in common, and not as joint tenants, to the only proper and absolute use and behoof of them, their heirs and assigns for ever: counsel made a point, that, although the seisin was in common, yet the use being to them as joint-tenants, whatever interest passed by the release survived to B., and no part descended under the release to the defendants, the heirs of C.: but, at a future day, time having been given him to consider this point, he admitted that C. and D. took as tenants in common, although, if it had been a use executed by the statute, the consequence would be, that they were joint-tenants, yet he admitted, that, where the person seised to the use and *cestui que use* is the same, the statute does not operate. And for this he cited Lord *Bacon*, *ut supra*. Wherefore judgment passed for the defendants. *Doe* ex dem. *Hutchinson* v. *Prestwidge*, 4 Maule & Selw. 178. This was certainly admitting the principle to a great extent, and it seems that there was ample room for argument.

On conveyances not operating by transmutation of possession.

IV. On conveyances not operating by transmutation of possession, viz. a covenant to stand seised, or a bargain and sale under the statute, the

ditaments and premises hereby released and assigned, or otherwise assured, or intended so to be, which shall become due after the said [*infant child*] shall have attained the age of twenty-one years, or have departed this life under that age, and shall be received by them and him respectively; and also the money which shall arise by or from such sale or sales respectively; in the first place deduct and retain to and for themselves, himself, and herself respectively, the costs, charges, and expenses of and attending the execution of the trusts

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to retain expenses attending the trusts.

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uses are fed by the seisin of the covenantor or bargainor, and the covenantee or bargainee has only a use, which is immediately executed into a legal estate by the statute; and therefore any ulterior use will not be executed: as, for example, if A. covenant to stand seised to the use of B., to the use of C., or bargain and sell to B. to the use of C., the use to B. only is executed by the statute, and the use to C. is a trust estate. *Tyrrel's* case, Dyer, 155 a; Shep. Touch. 225, 508; 7 Bac. Abr. 121, Uses (H.), 1; *Ash* v. *Gallen*, Ch. Ca. 114; 22 Vin. Abr. 207, pl. 14.

As to rents.

V. Before the statute, a rent newly created might be bargained and sold; because, when the money, as an equivalent, was given, and ceremonies or words of law were wanting, the Chancery supplied them; therefore this was good to pass the estate, without any words of granting.

But, since the statute, a rent newly created cannot be bargained and sold, because there ought to be a freehold in some other person to be executed in *cestui que use;* but there can be no seisin of this rent in the bargainor, because no man can be seised of a rent in his own land; and consequently there can be no estate to be executed in the bargainee. *Chudleigh's* case, 1 Co. 127 a; Gilb. Uses, 86, 281, 287.

The statute has two provisions for the execution of rents:—the first, for rents *in esse* limited to uses, or created *de novo*, to uses, which are executed in the same manner as uses of corporeal hereditaments; 27 Hen. 8, c. 10, s. 1;—the other, for rents limited in use out of the seisin in the land of some other person, *ex gratiâ*, where any person stands seised of any lands to the use that some other person may receive a rent thereout, which the statute executes in the same manner as if a sufficient grant had been made to him by the person seised to the use, and gives the *cestui que use* a power of distress. 27 Hen. 8, c. 10, s. 4, 5; *vide ante*, Vol. 1, p. 603. This clause, it has been held, relates as well to rents limited since the statute, as to rents then *in esse*; Dy. 362 b, pl. 21; *Danby* v. *Conyers*, 1 And. 51; Bendl. 315, pl. 299; therefore, if lands be conveyed to A. and his heirs, to the use that

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hereby reposed in them, him, and her, and the money which they, he, and she, respectively, shall disburse for taxes and repairs, or insurance, if any shall be made of the buildings of the said premises against loss or damage by fire; or in or about any suit or suits at law or in equity, for obtaining the possession of the premises, or any of them, or carrying the trusts hereby reposed in them, him, or her into execution, and enforcing the performance of any contract or contracts, with any person or persons who shall agree to become the purchaser or purchasers of the

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B. and his heirs may receive a given rent, the use will be executed by the statute. Sug. Gilb. Uses, 193. But, if lands are conveyed to A. and his heirs, to the use, intent, and purpose that B. and his heirs may receive a rent, with a declaration, that B. and his heirs shall stand seised of the rent, to the use of C. for life, with remainder over; the rent is executed in B., and then C. and the remainder-men take only the trust of the rent. *Chaplin* v. *Chaplin*, 3 P. Wms. 229, 231; Butl. n. Co. Litt. 271 b. III. 4, *ad fin.* Where the learned annotator says, "if the estate be conveyed to A. and his heirs, to the use that B. may receive a rent for life; and, after his decease, to the use that his first and other sons successively, and the heirs of their respective bodies, may receive the rent; these, *it may be contended*, are distinct rents; and therefore the rent to the second son *may be considered* too remote, as being a new rent limited to take effect after an indefinite failure of the issue of the first son. Objections also *may be made* to recoveries suffered by the father and son, as the tenant to the *præcipe* being made by the father, he will not be seised of that rent in which the son's intail subsists. The way, therefore, to limit the rent is, to grant a rent to a stranger and his heirs, that he may re-grant them to the intended uses." And see Butl. n. Fearne's Remainders, 529. The above doubts seem to have been founded on Lord Hardwicke's observations, in *Whitfield* v. *Fausset*, 1 Ves. sen. 390-1. But as the limitations of the use of the rent in that case are not clearly stated, and as his Lordship inclined to the opinion that it was but one rent, the correctness of the above doubts is extremely questionable. However, those doubts may be avoided without resorting to a grant and re-grant. For the grant of a rent-charge *de novo* to uses, is within the first section of the statute; Bac. Uses, 43; and see 1 Sand. on Uses, 101, 3d ed. Indeed, the learned annotator, in another place says, "if it is intended to limit a rent in strict settlement, it is necessary to do it by way of grant at common law to some person and his heirs, to the uses intended to be limited. This gives the grantee the mere seisin to the uses, and the uses declared upon it will be executed by the statute." Butl. n. Co. Litt. 298 a, *ad fin.* Mr. Sugden expresses the same

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said messuages, lands, hereditaments, and premises hereby released and assigned, or otherwise assured, or intended so to be, or any of them: *And then* UPON TRUST, to pay the residue or surplus of the money arising from the said rents and profits, and also from the sale of the said messuages, lands, hereditaments, and premises, and which shall from time to time remain in their, his, or her hands, unapplied to any of the purposes aforesaid, unto the said [*heir*], party hereto, [*the other children*], or such one or more of them as shall be living when the said [*infant child*]

and pay the residue among such of the children as shall be living when the infant attains 21, or dies under;

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point in these words, the rent may be granted to a stranger to the uses at once; see *Bascawen* v. *Cook*, 1 Mod. 223; *Cook* v. *Herle*, 2 Mod. 138, *S. C.*; although if limited by way of use to the stranger, the ulterior intended uses would be mere trusts. See *Chaplin* v. *Chaplin*, 3 P. Wms. 229; Sug. Gilb. Uses, 193.

What uses are executed by the statute on devises.

VI. The same doctrine extends to *devises:* therefore a devise to A. to the use of A., in trust for B., or unto and to the use of A., in trust for B., gives A. the legal estate, and B. an equitable estate only. *Robinson* v. *Comyns*, Cas. Temp. Talb. 164.

So a devise to A. and his heirs, to the use of B. and his heirs, would give the legal fee to B. But if the testator's intention cannot take effect under the statute of uses, the law will leave its effect to the statute of wills. Thus, if a devise be made to the use of A. for life, with remainders over, if it were considered as a limitation under the statute of uses, it would be void for want of a seisin to serve the uses. Butl. n. Co. Litt. 271 b., (1), III. 5. So, if a devise be to A. and his heirs, to the use of B. and his heirs, and A. die in the testator's life-time, perhaps the Courts would, in favour of the intention, construe the devise as a disposition not affected by the statute of uses, but as giving the fee to B. at once. But even admitting that the devise would be void at law, yet equity would compel the testator's heir to fulfil the intention, by conveying the estate to the same uses. Sug. Pow. 133, 2nd ed. But whether a devise to uses operates solely by the statute of wills; 1 Collectanea Juridica, 427; or by that statute jointly with the statute of uses, is, except in a very few cases, a matter rather of speculation than of use; 2 Fonbl. Treat. of Eq. 24, 5th edit. as it is now settled that an immediate devise to uses, without a seisin to serve those uses, is good; and that where the estate is devised to one for the benefit of another, the Courts execute the use in the first or second devisee, as appears to suit best with the intention of the testator. Butl. n. *ubi supra*. See further, 1 Powell on Devises, Jarm. ed. 208; 1 Sand. Uses, 203, 3rd edit., 195, 2nd edit.; Gilb. Uses, 162, 281, Sugd. edit. 356, 486; 1 Cru.

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shall attain the age of twenty-one years, or die under that age; and the issue of such one or more of them as shall die in the mean time leaving issue, who shall be then living, or who shall be then *in ventre sa mere*, and afterwards born alive, and to his, her, and their executors, administrators, and assigns, to be divided between them if more than one, so and in such manner that they may take their respective shares, as tenants in common; and so and in such proportions that the issue of different parents may take *per stirpes*, and not *per capita*; and so as no person

and the issue of such as shall die in mean time leaving issue;

to be divided between them as tenants in common *per stirpes*;

Dig. 436, 2nd edit. The subject is interesting, and sometimes leads to important results.

Where it is requisite, the legal estate should be in the trustees.

VII. 1, Independently of the rule that a use cannot be on a use, wherever something is to be done by the trustees, which makes it necessary for them to have the legal estate, such as payment of the rents and profits to another's separate use, or of the debts of the testator, or to pay rates and taxes, and keep the premises in repair, or where their approbation is necessary to the receipt of the rents and profits by a tenant for life, or the like, the legal estate is vested in them, and the person beneficially interested has only a trust estate: and this distinction has prevailed ever since the 36 Hen. 8, when the judges delivered an opinion, that, where a man made a feoffment in fee, to the use of the feoffor for life, and after his decease that A. *should take the profits*, the use was executed in A.; but on the contrary, if he said that after his death the feoffees should receive the profits, and pay them to A., the use would not be executed in A., because he could only have the profits by the hands of the feoffees. Bro. Abr. *Feffements al Uses*, pl. 52; Wms. n. 2 Saund. 11 c., and see *Kenrick* v. *Beauclerk*, 3 Bos. & Pul. 178. As where lands were *devised* to trustees and their heirs, *in trust* for a married woman and her heirs, and that the trustees should from time to time pay and dispose of the rents and profits to A., or to such person or persons as she by any writing under her hand, as well during coverture, as being sole, should order or appoint, without the intermeddling of her husband, whom the testator willed should have no benefit or disposal thereof; and as to the inheritance of the premises *in trust* for such person or persons, and for such estate and estates as A., by any writing purporting to be her will, or other writing under her hand, should appoint; and for want of such appointment, *in trust* for her and her heirs; the question was, whether this was a use executed by the statute, or a bare trust for A.: and the Court held it to be a trust only, and not a use executed by the statute. *Nevil* v. *Saunders*, 1 Vern. 115. So, where lands was devised to trustees and their heirs, in trust, after payment out of

1st. In devises.

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or persons may take under the description of issue, unless his, her, or their parent shall have departed this life before the said [*infant child*] shall attain the age of twenty-one years, or die under that age; and so that the said freehold messuages, lands, hereditaments, and premises may, as between the said [*heir*], party hereto, [*the other children*], and their respective issue, and their respective heirs, executors, and administrators, be fully and completely discharged from its character of being real estate, and be, and be considered as converted into personal estate: and the

the freehold lands to be discharged from the character of being real estate, and to be considered as personal.

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the rents and profits of several legacies, annuities, and the trustees' costs and charges, to *pay* all the residue of the rents and profits to A., a married woman, during her life, *for her separate use*, or as she should direct, and, after her death, the trustees to *stand seised to the use* of the heirs of her body severally and successively as they should happen to be in priority of birth and seniority of age, and to the heirs of their respective bodies in tail general, subject to the payment of the several annuities and legacies, with remainders over to the plaintiff. A. and her husband levied a fine, and suffered a recovery of the premises, and died without issue, under whom the defendant claimed the estate. Lord *King* was of opinion, that by the words of the will the use was executed in the trustees and their heirs during the life of A., and that she had only a trust in the surplus of the rents and profits, after payment of the annuities during her life; but that by the subsequent words, "that the trustees should stand seised to the use of the heirs of the body of A., &c.," the use was executed in the persons entitled to take by virtue thereof, chargeable with the payment of the annuities; and therefore, there being only a trust estate in the ancestor, and a use executed in the heirs of her body, those different interests could not unite so as to create an estate-tail, by operation of law in the ancestor, under the rule in *Shelley's* case, 1 Co. 93, that where the estate limited to the ancestor is merely an equitable or trust estate, and that to his heirs, &c., carries the legal estate, they will not incorporate into an estate of inheritance in the ancestor; as (in general) would have been the case, if they had been both of one quality, that is, both legal, or both equitable. Butl. Fearne, 52, 3rd. ed. 34. Lady *Jones* v. Lord *Say and Sele*, 8 Vin. Abr. 262, pl. 19. And the rather in this case his Lordship added, because it was limited to the heirs of her body severally and successively, as they should be in seniority of age and priority of birth, and the heirs of their respective bodies issuing: and he said there was a difference between this case and *Broughton* v. *Langley*, 2 Salk. 679; for there it was to *permit* A. to *receive* the rents and profits for life; but here it is a trust in the trustees, to *pay over* the rents and profits to such and such persons; and

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share or shares of each such issue, being an infant, to be paid to his or her guardian or guardians for the time being, for his or her use. AND *it is hereby declared and agreed* by and between the parties to these presents, as far as they respectively are interested, and they the said [*heir*], party hereto, [*the other children*], for themselves respectively, and their respective heirs, executors, administrators, and assigns, do, and each and every of them doth hereby direct and appoint, that the person or persons respectively, who shall become the purchaser or purchasers of the said

Purchaser's indemnity clause.

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therefore the estate must remain in them to answer these trusts; otherwise she must be the trustee, contrary to the express words of the will: and he decreed accordingly for the plaintiff. And this decree was affirmed in the House of Lords. 1 Eq. Ca. Abr. 383, pl. 4; 3 Bro. Parl. Cas. 113. It seems difficult to understand how the use could in this case be executed in the heirs of her body, because no person can have an heir until his death, and she died without issue. The counsel for the respondents made a more rational construction, when they said, it appeared to have been the intention of the devisor, that, after the death of A., a legal estate tail should vest in the heirs of her body, as purchasers, and not by descent. 3 Bro. Parl. Cas. 118. In which case, the uses in remainder would have been executed *sub modo* only, until the death of A., and then have been liable to be anticipated in enjoyment, by the contingent use in tail, arising to A.'s heirs, in the event of her leaving heirs of her body. But even that construction cannot be supported, as it seems clear, that the use could not execute either in the issue, if there had been any, or in those in remainder, because the trust, for payment of the legacies and annuities, required that the trustees should have the legal estate, to enable them to execute that trust; Butl. Fearne, 54; and therefore it seems, that, under the rule in *Shelley's* case, as the estate for life to A., and the limitation to the heirs of her body, were both equitable estates, they united, and she became equitable tenant in tail. Butl. Fearne's Rem. 56, 4th ed. 74. And consequently the estate tail and the remainders over, being both equitable estates *executed*, they were barred by the equitable recovery which she suffered. Fearne's Posthumous Works, 333. And see *White* v. *Carter*, Ambl. 670; 2 Eden, 366; *S. C.* Fearne's Rem. 55, 183, Butl. ed. And where a devise was made to trustees and their heirs upon trust, to permit and suffer a married woman to receive and take the rents and profits during her life, *for her own sole and separate use*, notwithstanding her coverture, *and without being in anywise subject to the debts, management, power, or control of her then or after-taken husband*, and her receipt alone to be a sufficient discharge, with remainder to her first and other sons in tail; it was

messuages, lands, hereditaments, and premises hereby released and assigned, or otherwise assured, or intended so to be, his, her, or their heirs, executors, or administrators, shall not be obliged or required to see to the application of the money to be advanced or paid by him, her, or them respectively, as the consideration of such purchase or purchases; nor be answerable or accountable for the misapplication or non-application of the same money, or any part thereof, after the same shall have been paid to, or to the order of, or under the direction of, the said trustees, or the

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held, that the legal estate was vested in the trustees, because, it being the intention of the testator to secure to the *feme covert* a separate allowance, free from the control of her husband, it was essentially necessary, to effectuate that intention, that the trustees should take the estate with the use executed in themselves, otherwise the husband would be entitled to receive the profits, and so defeat the very object the devisor had in view. *Harton* v. *Harton*, 7 Durnf. & East, 652. And see also *Reid* v. *Shergold*, 10 Ves. 377. Sir *James Mansfield*, 2 Taunt. 111, says, "he always understood the decision in *Jones* v. *Say and Sele*, to have gone on the same ground, that it was the case of a *feme covert*, and was so held in order to protect her. So, where lands were devised to trustees and their heirs in trust, that they should, out of the rents and profits, or by sale or mortgage of the whole, or so much of the estate as should be necessary, raise a sum sufficient to pay the testator's debts and legacies, and afterwards in trust, and to the use of A. for life, with several remainders over; the question was, whether the legal estate vested in the trustees: Lord *Hardwicke* was of opinion, that the devise to the trustees and their heirs carried the *whole fee* in point of law to them, and therefore the estate for life, as well as the estates in remainder, were merely trust estates in equity; that part of the trust was to sell the whole, or a sufficient part of the estate, for the payment of debts and legacies; which would carry a fee by construction, had the word *heirs* been omitted in the devise, as in *Shaw* v. *Weigh*, 1 Eq. Cas. Abr. 184; [Fearne's Rem. 284, 3rd ed. 356-7, Butl. ed.]; for the trustees must have a fee in the whole estate, to enable them to sell; because, it being uncertain what they may sell, no purchaser could otherwise be safe; that the only doubt he had was on the case of Lord *Say and Sele* v. Lady *Jones;* but, on examination, that case differed in a material point; and taking together all the clauses of that will, it amounted only to a devise to trustees, and their heirs, during another's life, upon which a legal remainder might be properly limited: but, in the present case, the whole fee being in the trustees, a remainder of the legal estate could not be limited to A. *Bagshaw* v. *Spencer*, 1 Ves. 143; 2 Atk. 246, 570; 1 Collectanea

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Trustees' receipts to be sufficient.

survivors or survivor of them, his or her heirs, executors, administrators, or assigns: And that every receipt which shall be given by the said [*three trustees*], and the survivors and survivor of them, his or her heirs, executors, administrators, or assigns, for such purchase money, or any part thereof, shall be a good, valid, and sufficient acquittance and discharge for the sum or sums of money which therein or thereby respectively shall be acknowledged or expressed to be or to have been received: And that every sale which shall be made, and contract for sale which shall

Trustees' contracts and conveyances to be

Juridica, 382. So, where lands were devised to trustees and their heirs, upon trust yearly, by equal quarterly payments, by and out of the rents and profits of the premises, after deducting rates, taxes, repairs, and expenses, to *pay* such clear sum as should then remain to A. and his assigns, for his life; and from and after his decease, *to the use* and behoof of the heirs male of the body of A. as they should be in priority of birth; with remainder over in default of such issue. Lord *Thurlow* held, that the trustees being to pay the taxes, repairs, &c., must have an interest in the premises; that, therefore, the legal estate for the life of A. was in them, and he had only an equitable estate for life, *and the subsequent estate being executed, he had an equitable estate for life, and a legal remainder in tail,* [it is difficult to understand how A. could have a remainder in tail, when his heirs took by purchase. *Quære*, omit the words in italics, and read those afterwards in crotchets], which could not unite [with the legal remainder in tail to his heirs male]; and, of course, there could not be a good tenant to the *præcipe*, and the recovery suffered by A. was void. It being necessary, in order to make a good tenant to the *præcipe*, that there should be a legal estate for life, with a legal reversion in tail, or an equitable estate for life, with an equitable reversion in tail. *Shapland* v. *Smith*, 1 Bro. C. C. 75; Fearne's Posthumous Works, 421; 2 Cox, 145. See also *Robinson* v. *Grey*, 9 East, 1; *Chapman* v. *Blissett*, Cas. Temp. Talb. 150. So, where the testator devised, unto his friends and trustees, W. L. and J. L., his several houses therein described, and also all his monies in the public funds or otherwise, which he should die possessed of, to hold to them his said trustees, to and for the intents and purposes hereinafter mentioned, viz. upon trust to permit and suffer his the testator's wife to have, hold, use, occupy, possess, and enjoy the full, free, and uninterrupted possession and use of all and singular the interests of the said monies in the funds, or otherwise, and rents and profits arising from the said houses, for and during the term of her natural life, if she should continue his widow, and unmarried; and that her receipts for all rents, interests, profits, *with the approbation of any one of his said trustees*

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be entered into, and conveyance which shall be executed by the said [*three trustees*], and the survivors and survivor of them, his or her heirs, executors, administrators, or assigns, shall be binding and conclusive on the said [*heir*], party hereto, [*the other children*] respectively, and their respective heirs, executors, administrators, and assigns, and every of them. PROVIDED ALWAYS, *and it is hereby declared and agreed* by and between the parties to these presents, as far as they respectively are interested, that the said [*three trustees*], and each and every of them, and the

Binding on persons beneficially interested.

Trustees' indemnity clause.

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should be good and valid, she, his said wife, providing for, and educating properly, all the (five) children (therein named) which the testator then had; and also paying Mrs. M. D. thereout of his said estates one annuity of 20*l.* half yearly, to whom the testator bequeathed the same during her natural life, and likewise paying to Miss M. J., besides board and lodging, one other like annuity of 20*l.* half yearly, to whom the testator also bequeathed the same. The question was, whether, on the true construction of the above devise, the use was executed in the widow, under the statute of uses, giving her the legal estate, so as to enable her to make a distress for rent. At the assizes, *Heath*, J. thought that no doubt a simple devise to trustees to suffer any one to enjoy rents and profits was a use executed in the *cestui que trust*, unless there is any thing to be done by the trustee: but, in this case, there were receipts to be approved and annuities to be paid. He therefore thought that, as there was something to be done by the devisees, the use was not executed in the widow, and under his direction the jury found a verdict accordingly, On a motion for a new trial, *Chambre*, J. said, in this case, the legal estate is in the trustees: to determine that, we must look to the intent of the will: and it seems pretty clear that intent was not to give the widow the legal estate. It is true, there is very little left for the trustees to do during her widowhood; but if it was intended that she should have the legal estate, there would have been no need of any trustees at all. The testator making the approbation of the trustees necessary to her receipts, I think, shews it was not intended to give the widow a legal estate. *Gibbs*, J.—The rule has been misconceived. Though an estate be devised to A. and his heirs, to the use of B. and his heirs, the Courts will not hold it to be a use executed, unless it appears by the whole will to be the testator's intent that it should be executed. The Courts will rather say, the use is not executed, because the approbation of a trustee is made necessary; than that the approbation of a trustee is not necessary, because the use is executed. The very circumstance which is to discharge the tenants, is the approbation of one of the trustees: "I leave my wife to receive the rents, pro-

CONFIRMATION, RELEASE IN FEE, AND ASSIGNMENT ON TRUSTS FOR SALE.

heirs, executors, administrators, and assigns of them, and each and every of them, shall be charged and chargeable only for such monies as they respectively shall actually receive by virtue of the trusts hereby reposed in them, notwithstanding his, her, or their, or any or either of their, giving or signing, or joining in giving or signing, any receipt or receipts, for the sake of conformity: And that neither of them, his, her, or their heirs, executors, administrators, or assigns, shall be answerable or accountable for any banker or other person with whom, or in whose hands, any part

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vided there is always the control of one of the trustees upon her receipts." The testator, therefore, certainly meant that some control should be exercised; and what could that control be, except they were to exercise it in the character of trustees? I agree, therefore, that the legal estate is in the trustees. *Gregory* v. *Henderson*, 4 Taunt. 772.

2ndly in deeds.

VII. 2nd. The same principle of construction is equally applicable to *deeds*: thus, where A., tenant for life, remainder to B. his son in tail, reversion to A., in fee, conveyed lands to trustees, and levied a fine of estates in L. and N., to the use of the trustees and their heirs, in trust, with the consent, in writing, of A., A.'s wife, and B. or the survivor of them, and of an incumbrancer, to sell the estates in fee, and apply the money arising by sale of the N. estates, in discharging debts, redeeming annuities, &c., and stand possessed of the money arising by sale of the L. estate, upon trust to invest the same, with the approbation of A., A.'s wife, and B., in the purchase of other lands in fee, to be settled to uses for their benefit: with a proviso, that the *rents, issues and profits* of the L. estate should, *until sale of the inheritance, be received by such person and for such uses as the same rents, &c., would have been if these presents had not been made and no fines levied:* it was held, that the use of the L. estate was immediately executed in the trustees, even before any consent given for the sale of it by A., &c.: that the proviso, that the rents, &c., should be received by such person, &c., was nothing more than the common provision in such cases, for the perception of the rents and profits by the persons beneficially entitled at the time of the conveyance, until the sale should be made, and by no means carried the legal estate to such persons. *Keene* v. *Deardon*, 8 East, 248, 263.

Where it is requisite, the legal estate should be in the person beneficially interested.

VIII. In general, it has been shewn, the distinction is, that, where the limitation to trustees and their heirs is *in trust to receive the rents and profits and pay them over to* A., for life, &c., this use to A. is not executed by the statute, but the legal estate is vested in the trustees to en-

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of the said trust monies shall or may be deposited or lodged for safe custody, or otherwise, in the execution of the trusts hereinbefore contained: AND that they, or any or either of them, shall not be answerable or accountable for any misfortune, loss, or damage, which may happen in the execution of the aforesaid trusts, or in relation thereto, except the same shall happen by or through his, her, or their own wilful default respectively; and then and in that case each person respectively shall singly and alone be answerable for such loss or damage as shall arise from his or

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able them to perform the will; but where the limitation is to trustees and their heirs, in trust, *to permit and suffer A. to receive* the rents and profits for his life, &c., the use is executed in A. unless it be necessary that the use should be executed in the trustees, to enable them to perform the trust. As, where lands were devised to trustees and their heirs, and the testator declared that the trustees and their heirs should stand seised of the lands, to the uses, intents, and purposes thereinafter mentioned, that is to say, to the intent and purpose, to permit and suffer A. *to receive and take* the rents and profits for and during the term of his life, and, after his decease, should stand seised of the lands, to the use of the heirs of the body of A., remainder over; with a proviso, that A., with the consent of the trustees, might make a jointure for his wife; it was held, that this was a use executed in A., and not a trust estate, because it would have been a plain trust at common law; and what at common law was a trust of a freehold, or an inheritance, is executed by the statute, which mentions the word *trust*, as well as use. And it was held, that a power to make a jointure does not necessarily exclude an estate tail; because, as tenant in tail cannot make a jointure without discontinuing or barring the entail, such power has its use. And the case of *Burchett* v. *Durdant*, 2 Vent. 312, adjudged to the contrary upon the above point, was denied to be law. *Broughton* v. *Langley*, 2 Ld. Raym. 873; 2 Salk. 679; 1 Lutw. 814, 823; 1 Eq. Ca. Abr. 383, pl. 3; Fearne's Rem. 116, 3rd ed.; 159, Butl. ed. And the same distinction was taken by Lord *Kenyon*, in the case of *Doe* on the demise of *Woolley* v. *Pickard*, Stafford Summer Assizes, 1797; and by Mr. Justice *Lawrence*, in *Jones* v. *Prosser*, Worcester Spring Assizes, 1798. Wms. n. 2 Saund. 12. So, where lands were devised to two trustees, and the survivor of them, to hold to them and the survivor, and his heirs and assigns, upon trust to permit and suffer the testator's wife to have, receive, and take the rents, issues, and profits thereof during her natural life, for her own absolute use and benefit, and from and after her decease, in case A. should be then living, in trust, *to pay unto, or permit and suffer A. to have, receive, and take* the rents, issues, and profits

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Power to trustees to reimburse themselves their expenses.

her own default: And also that it shall and may be lawful to and for the said [*three trustees*] respectively, and their respective heirs, executors, administrators, and assigns, and each and every of them, by and out of the monies which shall come to his, her, and their respective hands, by virtue of the trusts aforesaid, to deduct, retain, and reimburse to and for himself and themselves respectively, all costs charges, damages, expenses, and fees to counsel for advice, which he, she, they, or any of them shall or may suffer, sustain, expend, disburse, lay out, be

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thereof, for her natural life, with remainder over: the question was, whether the legal estate was in the survivor of the devisees in trust, or in A. *Mansfield*, C. J.—I thought it had been settled by the case of *Shapland* v. *Smith*, that the distinction was abolished, unless in cases where something especial was to be done by the trustee, as to pay rates or repairs: but I find it is otherwise. It is miraculous how the distinction ever became established; for good sense requires that in both cases it should equally be a trust, and that the estate should be executed in the trustees; *for how can a man be said to permit and suffer, who has no estate, and no power to hinder the* cestui que trust *from receiving*. The Court took time to consider, and on another day the Chief Justice delivered the following judgment:—This case might be argued and considered for ever, without advancing it at all in law, reason, or precedent. But, as it happens, in this will, the last words are, "permit and suffer," which give the *cestui que trust* a legal estate; and the general rule is, that, if there be a repugnancy, the first words in a deed, and the last words in a will, shall prevail; and consequently, for want of a better reason, we are forced to say that we think this will gives the legal estate to the party beneficially interested. *Doe*, ex dem. *Leicester* v. *Biggs*, 2 Taunt. 109. [See an observation upon this case, 1 Jarm. Pow. Dev. 222.] So, under a devise to trustees, their heirs, &c., of freehold and leasehold estate, upon trust *to permit and suffer the testator's wife to receive and take the rents and profits until his son should attain twenty-one*, and then to the use of his son in fee; and a devise of other lands to the trustees, upon trust to receive the rents and profits till his son attained twenty-one; and in the mean time to apply the profits in discharging the interest of a bond of 3,000*l.* and on his son attaining twenty-one, upon trust by sale, lease, or mortgage of the last-mentioned premises, to raise the 3,000*l.*, and discharge the bond; and, subject thereto, to the use of his son in fee on his attaining twenty-one: and a third devise of other lands, and the residue of his real and personal estate, to the use of the same trustees, in trust, by sale, lease, or mortgage of the same, to raise 3,000*l.*, and pay it to his daughter E.: and

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Partial power of pre-emption to heir.

at, or be put unto, in or about the execution of the aforesaid trusts, or in relation thereunto (*h*). PROVIDED ALWAYS, *and it is hereby declared and agreed* by and between the said parties to these presents, as far as they respectively are interested, that the said [*heir*], party hereto, shall, on giving notice of his intention in writing to the said [*three trustees*], or the survivors or survivor of them, his or her heirs, executors, administrators, or assigns, within ten days after the said [*infant child*] shall attain the age of twenty-one years, or die under that age, which shall first happen, have the op-

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after payment thereof, absolutely to sell and dispose of so much of the residue of his said lands, &c., as they should think proper, to raise money to pay his debts, legacies, and funeral expenses; and then upon trust to pay the interest and produce of his real and personal estate to his then wife, for the maintenance of herself and two children till the latter should attain twenty-one, if she continued his widow; but if not, then for the benefit of the two children till twenty-one; and then to transfer to those children such residue; with further trusts if either or both of them died under twenty-one; with a proviso, that it should be lawful for the trustees, and the survivor, at any time or times, *till all* the said lands, &c. devised to them, upon trust as aforesaid, *should actually become vested in any other person or persons by virtue of the will, or until the same or any part thereof should be absolutely sold as aforesaid,* to lease *the same or any part thereof,* for any term not exceeding fourteen years, in *possession* and not in reversion, at the best rent, &c.; it was held that the devise in the first clause to the trustees, upon trust *to permit and suffer the testator's wife to receive and take the rents and profits* of the lands there described, until his son *attained* twenty-one, vested the legal estate of those lands in her, and was not affected by the subsequent leasing power given to the trustees, which, it was held, was confined to premises originally vested in them as trustees, or over which, when afterwards becoming vested in others, the trustees retained a power of sale, &c. *Right,* lessee of *Phillipps,* v. *Smith,* 12 East, 455. So, a devise of lands to a trustee and his heirs, to the *use* of A. and B. during their lives, and the life of the longest liver of them, without impeachment of waste: and from and after the determination of that estate, to the use of the trustee and his heirs, during the lives of A. and B. and the life of the longest liver of them, upon trust to preserve the contingent uses and estates, &c., but nevertheless to permit the said A. and

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(*h*) As the trusts would necessarily soon terminate in the above instance, and as three trustees were appointed, the usual clause for appointing new trustees was omitted.

POWER TO APPOINT NEW TRUSTEES.

CONFIRMATION, RELEASE IN FEE, AND ASSIGNMENT ON TRUSTS FOR SALE.

tion, and be entitled to a preference of purchasing the freehold and inheritance of the said messuage and lands in —— aforesaid; together with all coppers, grates, shelves, cupboards, and actual fixtures, dressers, shelves, doors, and partitions belonging thereto, upon the terms of agreeing to pay, and actually securing to the trustees or trustee for the time being of these presents, the payment for the same within three calendar months after the said [*infant child*] shall attain the age of twenty-one years, or die under that age, the price or sum of —— thousand

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B. and the survivor of them, during their lives, and the life of the longest liver of them, to receive and take the rents and profits of the said lands and premises for their own use: and from and after the several deceases of A. and B., then *in trust* for the heirs male of the body and bodies of A. and B.: and, in default of such issue, then to and for the *use* and behoof of C. and his heirs. A. died without issue; B. afterwards suffered a recovery of the premises; devised them to his daughter in tail general; and died without issue: the question was, whether the devise to the trustee and his heirs *in trust* for the heirs male of the bodies of A. and B. were executed, so as to make that a legal estate, as well as the estate for life, and therefore, whether B.'s recovery had barred C. the lessor of the plaintiff? Lord *Ellenborough*, C. J.—The testator uses the words *trust* and *use* indifferently: both of them are within the operation of the statute; for a trust may be executed as well as a use. And nothing else is relied on but the change of these words in order to denote the testator's intention. In truth, in every case where a testator creates an estate tail by words of this description, unless he is perfectly cognizant of the technical rule of law, he does not intend to enlarge the life estate of the first taker to an estate tail: but the rule of law notwithstanding attaches to give the first taker an estate tail. *Postea* to the defendant. *Doe* ex dem. *Terry* v. *Collier*, 11 East, 377. So, under a devise of lands, arrears of rent, and a bond and judgment to trustees, and the survivor, and the executors and administrators of such survivor, in trust, out of the rents and profits of the said estates and arrears, &c., to pay certain annuities for lives, and a sum in gross; and, from and after payment of the said annuities and money, the testator devised successive estates for lives, remainder to C. W. in tail, remainder to his own right heirs; and he also gave a general power of leasing to the trustees for the best rent, with an allowance of 10*l.* a year to each for their trouble: it was held, that the purposes of the trust being all answered by the death of the annuitants, and the raising of the money for legacies, the remainder-man in tail (the life estate being spent) took the legal estate in the premises. For, where the purposes of a trust may be

—— hundred pounds sterling: *But*, after the expiration of the said ten days, without any option declared, or after the expiration of the said three calendar months without such payment being made, the said option shall be forfeited and cease and be void. AND EACH AND EVERY OF THEM THE SAID [*heir*], party hereto, [*the other children*] severally, separate, and apart from the others of them, doth hereby for himself and herself respectively, and his and her respective heirs, executors, and administrators, and as to and concerning only the acts, deeds, and defaults

CONFIRMATION, RELEASE IN FEE, AND ASSIGNMENT ON TRUSTS FOR SALE.

Covenant by each of the persons beneficially interested, restrained to separate acts and deeds.

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answered by giving the trustees a less estate than a fee, no greater estate shall pass to them *by implication;* but the uses in remainder limited on such lesser estate so given to them shall be executed by the statute. And in this case it was held sufficient, to answer the purposes of the trust, to give the trustees by implication an estate for the lives of the annuitants, with a term of years in remainder, sufficient for the purpose of raising the gross sum charged out of the rents and profits. And this construction was held to be further confirmed in this particular case, by the bequest to the trustees of the arrears, and the bond and judgment, as well as of the rents and profits; for otherwise the interest in the bond, &c., would go to different representatives than the estate, if the trustees took a fee: and the leasing power was only to be executed as the occasions of the trust required: and there was also a personal remuneration to the trustees of 10*l.* a year for their trouble, which was not extended to their heirs; who indeed were not named in the devise. *Doe* ex dem. *White* v. *Simpson*, 5 East, 162. [As to the doctrines deducible from this and the other cases, referred to in the present note, see 1 Jarm. Pow. Dev. 221. *Vide* also *Morrant* v. *Gough*, 7 B. & C. 206.]

IX. Eatates for *years* cannot be conveyed to uses so as to be executed into legal estate by the statute, because the words of the statute are, where any person shall be *seised*, and a lessee for years is not seised, but is only *possessed;* for the word *seisin*, in the language of the law, is exclusively applied to estates of freehold and inheritance; Litt. s. 324; Co. Litt. 200 b; because there needs no livery of seisin to be made to the lessee: Litt. s. 59: therefore, if A., possessed of a lease for years, assign it to B. to the use of C., the legal estate is in B., and C. takes only a trust or equitable estate: but A., seised in fee, may convey his estate to B. to the use of C. for years; or A. seised in fee, may bargain and sell, or covenant to stand seised to the use of C. for years; and such use would be executed by the statute, so as to vest a legal estate for years in C.

Estates for years are not within the statute, and therefore not executed, unless created anew out of a freehold estate.

CONFIRMATION, RELEASE IN FEE, AND ASSIGNMENT ON TRUSTS FOR SALE.

That they have not incumbered:

of himself and herself respectively, and for his and her respective heirs, executors, and administrators, covenant and agree with the said [*three trustees*], their heirs, executors, administrators, and assigns, that they the said [*heir*], party hereto, [*the other children*] respectively, have not, at any time or times heretofore, made, done, executed, committed, or willingly or knowingly suffered any act, deed, matter, or thing whatsoever, whereby or by reason or means whereof the said freehold messuages, lands, hereditaments, and premises hereby released, or otherwise assured, or in-

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Copyholds are not within the statute.

X. The statute of uses does not extend to *copyholds*, because the transmutation of possession by the sole operation of the statute, without the consent or allowance of the lord, or the agreement of the tenant, would tend to the prejudice both of the lord and of the tenant: Co. Cop. s. 54; Tr. 124. Wms. n. 2 Saund. 12: and this is plain from common experience; for, when a copyholder surrenders to the use of another, the possession is not executed to the use; as the estate remains in the surrenderor, and surrenderee has nothing until admittance but an equitable estate: Gilb. Ten. 182; 1 Sand. Uses, 203, 3rd edit., 195, 2nd edit.; 1 Cru. Dig. 418, 2nd edit.; Cru. Uses, 55; Sug. Gilb. Uses, 72: and therefore a surrender of copyhold lands to uses is not to be considered on the foot of a use or trust; for, as copyholds are not within the statute of uses, such surrender is only a direction to the lord whom to admit; and when admitted, the surrenderee is in by the grant of the lord, not of the surrenderor; so that it is of a particular nature, and not as a use or trust on the statute: *Per Lord Hardwicke*, 2 Ves. 257; 1 Watk. Cop. [100] [185]. 2 Ibid. [193]: and therefore the construction of the surrender of copyholds must be the same as if the estates had been limited by feoffment, or any other deed, deriving its effect purely from the principles of the common law, without the intervention of the statute of uses, and must be alike governed by the same rules of the common law. *Per Holt*, C. J. 1 P. Wms. 76. And therefore it should of consequence follow, that springing uses, or uses to arise in future, cannot be created by surrender. Gilb. Ten. 260-1; Watk. n. 5 Bac. Abr. 779. Mr. *Watkins* says, that a fee cannot be limited on a fee by a common law conveyance, is not necessary to be proved; it is acknowledged. And surely if a surrender of copyhold lands is to be construed as a common law conveyance, it must follow, as an inevitable consequence, that a fee cannot be limited on a fee by a surrender; for, if a fee *can* be limited on a fee by a surrender, then the surrender *cannot* be construed as a conveyance at common law. And on the same principle, if an estate for life, or of inheritance, cannot be created to commence *in futuro* by a common law conveyance, and a surrender of copyholds ought to be

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tended so to be, or the said leasehold piece of land, or any part of the same respectively, shall or may be impeached, charged, incumbered, or in any wise affected in title, charge, estate, or otherwise howsoever: AND ALSO that they the said [*heir*], party hereto, [*the other children*] respectively, and their respective heirs, executors, and administrators, shall and will, from time to time, and at all times, upon every reasonable request of any person or persons entitled by virtue of these presents to any estate, interest, or benefit in the said messuages, lands, heredita-

and for further assurance:

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construed as such conveyance at common law ought to be construed, then an estate for life, or of inheritance, cannot be created to commence *in futuro* by a surrender of copyholds. If we acknowledge the premises, we must not deny the conclusion. 1 Watk. Cop. [208]; Sug. n. Gilb. Uses, 353. The learned Mr. Sanders, however, is not satisfied with this reasoning, in the shape of a syllogism; he says, *syllogismus assensum constringit, non res:* and endeavours to show, that the use limited on an *immediate* surrender, has no resemblance to a feoffment at the common law before the introduction of uses; but that it closely corresponds with the use, in its fiduciary state, on a feoffment: Sanders on Surrenders of Copyholds, page 7; and, after observing that there can be no doubt that, by means of *uses* limited on feoffments, or other common law conveyances, a freehold may be created to commence *in futuro*, without a previous particular estate to support it, and that a fee may be limited upon a fee, or that pre-existing uses, commensurate to the fee-simple, may be defeated by contingent, springing, and executory uses; and that the question to be considered is, whether, in these instances, uses on a surrender correspond with uses on feoffments, or other common law conveyances; he proceeds to shew, that the resemblance between them is not destroyed or opposed by any *direct decision;* and that, consequently, there will be no material difficulty in establishing the analogy between them by authority, as well as principle; page 20; and he comes to the conclusion, that the authorities in favour of the limitation of a *future* use, on an immediate surrender of a copyhold, appears satisfactory; page 36; and that springing, contingent, and executory uses, may be limited upon a surrender, defeating, by their operation, uses previously existing by limitation and admittance; page 43; from whence he assumes that powers of revocation and appointment are applicable to settlements of copyhold estates, because a use, arising under the exercise of a power, is a springing use, page 57†. Considerable reliance is placed on *forms of deeds* in Lex Customaria, Jacob's Court Keeper, the English Copyholder, and Horseman's Conveyancing; but the errors of these books

† *Vide ante*, p. 221.

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ments, and premises hereby released and assigned, or otherwise assured, or intended so to be, or any or either of them, and at the costs and charges of the person or persons by whom such request shall be made, make, do, acknowledge, levy, suffer, execute, and perfect, or cause or procure to be made, done, acknowledged, levied, suffered, executed, and perfected, all such further and other lawful and reasonable acts, deeds, devices, conveyances, assignments, and assurances in the law whatsoever, either by fine or fines,
[*526] *with or without proclamations, common recovery or common recoveries, deed or deeds inrolled or not inrolled, release, confirmation, or other assurance whatsoever, for further, better, more perfectly, lawfully, and absolutely or satisfactorily granting, releasing, confirming, assigning, or otherwise assuring the said messuages, lands, hereditaments and premises hereby released and assigned, or otherwise assured, or intended so to be, and every part and parcel of the same, with the appurtenances, *To* the uses,
[*527] *upon the trusts, and for the ends, intents, and purposes hereinbefore limited, expressed, and declared of and concerning the same, according to the true intent and meaning of these presents; *As* by the person or persons so en-

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can be of no authority, when the principle they would establish is contrary to reason; and besides, there are other forms in all these books, which would equally countenance the contrary doctrine. The learned gentleman also says, page 47, Kitchen, 170, edit. 1657, one of the oldest writers on copyholds, says, " use may be of copyhold, as well as of freeholds." But the words which immediately succeed in Kitchen, are omitted, viz. " but the statute of 27 Hen. 8, for uniting the possession to the use, doth not extend to such tenures: nor (he to whose use) cannot forfeit the land by cutting trees, if it were not by the consent and commandment of the *copyholder*." Kitchen on Courts, 172, edit. 1663. Mr. Fearne appears to have been of the same opinion as Mr. Sanders; Contingent Remainders, 201, 3rd edit., 417, 4th edit., 276, Butl. edit. See 5 Cru. Dig. 590, s. 98, 2nd edit.

Since writing the above note, Mr. Scriven has entered largely into a confutation of Mr. Sanders's Treatise on Surrenders of Copyholds. Scriven on Copyholds, 185, 207, &c. 2nd ed. [See also 1 Watk. Cop. by Coventry, 263. But the late case of *Boddington* v. *Abernethy*, 8 Dowl. & Ryl. 626, stated *ante*, Vol. 1, p. 221, establishing that a power of revocation and new appointment may be reserved of copyholds, will probably be considered by the learned reader as favouring Mr. Sanders's view of the question].

titled and making such request, or his, her, or their counsel in the law, shall be reasonably devised or advised, and re-*quired, and tendered to be made, done, and executed. In WITNESS, &c.

CONFIRMATION, RELEASE IN FEE, AND ASSIGNMENT ON TRUSTS FOR SALE.

[*529]

ATTESTATION *of the Execution by the Infant after she became of age.*

ATTESTATION OF EXECUTION BY A PERSON WHO AFTERWARDS BECAME OF AGE.

SIGNED, sealed, and delivered by the within-named [——] on the —— day of ——, one thousand eight hundred and ——, (she being then of the age of twenty-one years, (*a*)) in the presence of us,
A. B., of &c.
C. D., of &c.

Of course, if the late infant were married at the time of the execution, a fine from her and her husband would be requisite to convey her interest. So, if the late infant were a married man, having the legal, as well as the equitable, inheritance in possession, a fine would be requisite to bar his wife's right to dower.

There does not appear to be any objection under the stamp laws to the execution of a deed by a person attaining majority subsequently to the date of the deed.

[(*a*) It seems advisable in such a case to indorse upon the deed a copy of the baptismal register, shewing the exact age of the executing party.]

BY HEIR OF DEVISE BY EQUITABLE TENANT IN TAIL OF COPYHOLDS.

CONFIRMATION *of a* DEVISE *of a* COPYHOLD *to a Younger Son, where the* TESTATRIX BEING EQUITABLE (*a*) TENANT IN TAIL, *with the Equitable Remainder in Fee, only the Equitable Remainder in Fee passed by her Will, but the Heir being desirous to establish the Devise intended to have been made,—For that purpose, the Heir and the Devisee, on the Day of the Date of this Indenture, have surrendered to the Use of Trustees in Fee the devised Premises; with a Memorandum, that the Surrender was made to the Trustees, Upon such Trusts, &c., as the Devisee should by his Will appoint; and in Default of Appointment, In Trust for the Devisee in Fee. Testatum,* COVENANT *by the Heir for further Assurance; and for Peaceable Enjoyment: and* COVENANT *by the Devisee with the Heir, for Peaceable Enjoyment of Copyholds devised to him.*

Parties.

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*heir*], of &c., eldest son and heir, and

All equitable estates in copyholds, excepting equitable estates tail, will pass by will.

(*a*) Where a person has any equitable estate in copyholds, besides an equitable estate tail, such equity will pass by an unattested will without a surrender: for of an equity no surrender can be made: nor can the devisee require any admittance, as he will not become tenant to the lord. *Carr* v. *Ellison*, 3 Atk. 73; *Tuffnell* v. *Page*, 2 Atk. 37, n.; 2 P. Wms. 261; *Allen* v. *Poulton*, 1 Ves. sen. 121; *Attorney-General* v. *Andrews*, Ibid. 225; *Burkitt* v. *Burkitt*, 2 Vern. 499; *Carey* v. *Askew*, 1 Cox, 244; *Macnamara* v. *Jones*, 1 Bro. C. C. 480; *King* v. *King*, 3 P. Wms. Cox's ed. 360, and Ed. note (1); 1 Watk. Cop. 124, 131, 180.

An equitable entail in copyholds must be docked before it can be devised:

But an equitable estate tail will not pass by devise. For, as in the case of an equitable estate tail in freehold lands, a fine or recovery is requisite in order to destroy it; *Boteler* v. *Allington*, 1 Bro. C. C. 72; *Salvin* v. *Thornton*, cited Ibid. 73, n. (2); *Legate* v. *Sewell*, 1 P. Wms. 91; so, in that of copyholds, the entail must be first docked, as if it were a legal entail: and the estate will not pass merely by the devise. *Rowe* v. *Lowe*, 1

a devisee named in the last will and testament of [*testatrix*], late of &c., widow, deceased, who survived, and was a devisee named in the last will and testament of [*husband*], late of &c., her late husband, also deceased; and which said [*testatrix*] was the only surviving child of [R. B.], late of &c., deceased, by Mary his wife, also deceased, before her marriage with him, called [Mary L.], of the one part; and [*devisee*], of &c., the younger son of the said [*testatrix*], and a devisee named in her last will and testament, of the other part. WHEREAS the said [*testatrix*] made and duly executed her last will and testament in writing, bearing date on or about the —— day of ——, 18—, and thereby, amongst divers other devises and bequests therein contained, gave, devised, and appointed her copyhold messuage or dwelling house, &c. unto and to the use of her said son [*heir*], his heirs, sequels in right, and assigns for ever: *And* she gave, devised, and appointed her two copyhold messuages, &c., unto and to the use of her said son [*devisee*], his heirs, sequels in right, and assigns for ever. AND WHEREAS the said [*testatrix*] departed this life soon after making and executing her said will, without revoking or varying the same. AND WHEREAS since the decease of the said [*testatrix*] it has been dis-*covered, that she, the said [*testatrix*], at the time of making and executing her said will, as being the only surviving child of the said [R. B.], by the said Mary his wife, was, in virtue of the settlement made previous to their marriage, bearing date, &c., entitled only to an equitable estate tail in possession of and in the said copyhold messuages and premises by her said will devised to the said

BY HEIR OF DEVISE BY EQUITABLE TENANT IN TAIL OF COPYHOLDS.

Recital of a will of copyholds, whereby testatrix gave one copyhold estate to her heir, and another to a younger son:

death of testatrix:

that testatrix being equitable tenant in tail, with equitable remainder in fee,

[*532]

Hen. Bl. 446, 461. *Vide ante*, Vol. 1, p. 159, *ad ultimum*. Nor will an equitable estate tail in a copyhold merge by the accession of the legal fee. *Mcrest* v. *James*, 6 Madd. 118.

As to a will of copyhold, *vide ante*, p. 477; *post*, p. 533.

The whole doctrine respecting equitable recoveries is contained in the very learned and admirable opinions of Lord *Eldon*, when Solicitor-General, Mr. Madocks and Mr. Fearne, upon the validity of the recoveries suffered by the Marquess of Bath, 1 (Hargrave's) Collectanea Juridica, 214; see also *ante*, Vol. 1, p. 16, and the cases cited, p. 17. [The much debated point, whether the concurrence of a mortgagee is necessary to the validity of an equitable recovery, has been rescently decided in the negative. *Nouaille* v. *Greenwood*, 1 Turn. 26].

only the equitable reversion in fee passed by her will,

but the heir being satisfied that testatrix intended to pass the whole inheritance to devisee, he has agreed to establish the devise intended to have been made:

and for that purpose heir and devisee have surrendered,

to the use of trustees in fee, devised premises;

with a memorandum, that the surrender was made to the trustees,

[*devisee*], and to the immediate equitable reversion in fee thereof; and that consequently only the equitable reversion in fee in the same premises passed by the said will; and the said estate tail, on her decease, descended and came to the said [*heir*]; but the said [*heir*] being well satisfied that it was the intention of his mother, the said [*testatrix*], to devise and pass by her said will to the said [*devisee*], the whole inheritance of the same two messuages and premises, free from any estate tail, therefore he the said [*heir*], in order to do justice to that intention, has voluntarily proposed and agreed to make, do, or join in all such acts and surrenders as may be necessary or requisite for supplying the defect in the said will, and for establishing the disposition thereby made, or intended to be made, of the said two messuages and premises, in favour and for the benefit of the said [*heir*]: And, for effectuating that purpose, the said [*heir*] hath in and by one surrender, bearing even date with these presents, together with the said [*devisee*], surrendered into the hands of the lord, according to the custom of the manor of —— aforesaid, *To the use* of [G. H.], of &c., and [J. G.], of &c., and their sequels in right, *The* said two messuages and premises devised, or intended to be devised to the said [*devisee*] as aforesaid, by the following description, namely, (*insert description*); *To* which said surrender is subscribed a memorandum (*b*), whereby it is declared, that the premises

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Trusts should be exemplified on court rolls.

(*b*) This is unavoidable in the case of a surrender to the use of a will until the death of the testator. But at the next Court after his death, the trusts of the will should be inserted on the court rolls. However, although it is generally desirable to have the trusts inserted in the court rolls, yet they may be omitted. *Vide ante*, Vol. 1, p. 563; Vol. 2, p. 340. For the form of the exemplification of the trusts on the court rolls, *vide ante*, Vol. 2, p. 342.

Stat. 55 Geo. 3, c. 192.

But an actual surrender to the use of a will of copyholds is not necessary, since the 55 Geo. 3, c. 192, the act of the late lamented Sir Samuel Romilly†, intitled *An act to remove certain difficulties in the Disposition of Copyhold Estates by Will;* which received the royal assent 12th July, 1815, and which act is as follows: "Whereas by the customs of certain manors, *copyhold estates* (A) of such manors pass by the last will and testament of the copyhold tenants thereof, declaring the uses of sur-

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[† This act was drawn by Sir B. Sugden, the present Solicitor-general.]

comprised in the said surrender are thereby so surrendered to the use of the said [G. H.] and [J. G.], and their sequels in right, *Upon such trusts,* and to and for such in- Upon such trusts, &c. as

renders made for that purpose: and whereas much inconvenience has arisen from the necessity of making such surrenders: for remedy whereof may it please your majesty that it may be enacted; and be it enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that, in all cases where by the custom of any manor in England or Ireland, any copyhold tenant of such manor may, by his or her last will and testament, dispose of, or appoint his or her copyhold tenements, the same having been surrendered to such uses as should be declared by such last will and testament, every disposition or charge made or to be made by any such last will and testament (B), by any person *who shall die after the passing of this act,* of any such copyhold tenements, or of any right, title (C), or interest in or to the same, shall be as valid and effectual to all intents and purposes, although no surrender shall have been made to the use of the last will and testament of such person, as the same would have been if a surrender had been made to the use of such will.

Dispositions by will of copyhold estates made effectual without previous surrenders to the uses thereof.

II. " Provided also, and it is hereby further enacted, that no person entitled, or claiming to be entitled, to copyhold lands, tenements, or hereditaments, in consequence of any testamentary disposition, shall be entitled to be admitted to the same by virtue of any thing in this act contained, except upon payment of all such stamp duties, fees, and sums of oney as would have been lawfully due and payable in respect of the surrendering of such copyhold lands, tenements, or hereditaments, to the use of such will, or in respect of the presenting, registering, or enrolling such surrender, had the same lands, tenements, and hereditaments been surrendered to the use of the will of the person so disposing of the same; all such stamp duties, fees, or sums of money due as aforesaid, to be paid in addition to the stamp duties, fees, or sums of money due or payable on the admission of such person so entitled or claiming to be entitled to the same copyhold lands, tenements, or hereditaments, and the stamp duties to be affixed to the copy of the admission.

Persons admitted under testamentary dispositions, to pay the like fees, &c., as would have been payable on such surrenders.

III. " Provided always, and it is hereby enacted and declared, that nothing in this act contained shall be construed, deemed, or taken, at law or in equity, to render invalid or ineffectual any devise or disposition of any copyhold lands, tenements, or hereditaments, or of any right, title, or interest in or to copyhold lands, tenements, or hereditaments, which would be valid or effectual if this act had not been made; or to render valid and effectual any devise or disposition of any copyhold lands, tenements, or hereditaments, or of any right, title, or interest in or to any copyhold lands, tenements, or hereditaments, which would be invalid or ineffectual if a

This act not to invalidate devises of copyholds, &c.

devisee should by his will appoint;

tents and purposes, as the said [*devisee*], by his last will and testament in writing, by him to be duly signed and published, in the presence of three or more credible wit-

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surrender had been made to the use of the last will and testament of the person attempting to dispose of the same by will; any thing hereinbefore contained to the contrary notwithstanding."

OBSERVATIONS ON THE ABOVE STATUTE.

It seems, that the 55 Geo. 3, c. 192, extends to customary freeholds where the custom has been to surrender to the use of a will.

(A) It seems, that this act extends to customary freeholds held by copy of court roll, where custom has established the right to surrender to the use of a will. *Hussey* v. *Grills*, Ambl. 301; *Doe* v. *Danvers*, 7 East, 299; *vide post*, (B), *ad ultimum*.

The difference between copyhold estates in a strict sense, and customary freeholds.

The difference between copyhold estates in a strict sense, and customary freeholds, is, customary freeholds are not held *at the will of the lord*, but only *according to the custom of the manor*. 2 Bla. Com. 149; Harg. n. Co. Litt. 59 b, (1). These customary freeholds are of such an amphibious nature, that, when compared with mere copyholds, they may, with sufficient propriety, be called freeholds; and, when compared with absolute freeholds, they may, with equal or greater propriety, be denominated copyholds. 1 Bla. Law Tracts, 8vo. ed. 105.

The statute of frauds, so far as it relates to wills, does not extend to copyholds.

(B) The 29 Car. 2, c. 3, so far as relates to wills, did not extend to copyhold lands, consequently a will of such lands, operating merely as a declaration of the use, did not require to be attested and subscribed in the presence of the devisor by three or four credible witnesses. Therefore, if a person surrendered a copyhold estate to such uses as he should by will appoint, a will, though attested by two witnesses, or by one only, or not attested at all, would have been sufficient to pass it; nor would it require a signature, unless a signature were made necessary by the terms of the surrender to the use of the will; *Tuffnell* v. *Page*, 2 Atk. 37; Barnard. Rep. in Chanc. 11, 12; *Attorney-General* v. *Andrews*, 1 Ves. sen. 225; *Wagstaff* v. *Wagstaff*, 2 P. Wms 258; *Carey* v. *Askew*, 2 Bro. C. C. 58; *Habergham* v. *Vincent*, 2 Ves. jun. 228, 232; *Roe* dem. *Gilman* v. *Heyhoe*, 2 Wm. Bla. 1114; *Doe* dem. *Cook* v. *Danvers*, 7 East, 299, 322; Phillips on Evidence, 4th edit. 527; 7 Bac. Abr. Gwill. edit. 315; [and see *Jervoise* v. *Duke of Northumberland*, 1 Jacob & Walk. 560]; consequently, as the above act, 55 Geo. 3, c. 192, does not require any witnesses to a will of copyhold lands, a will of the same nature as would pass a chattel interest will equally pass a copyhold estate.

Where a man made his will attested by *three* witnesses, and thereby (among other things) devised a copyhold estate, and afterwards caused such will to be altered, by striking out several of the freehold devises, and a memorandum to be written, that he had examined, perused, and approved of the will so altered; but did not republish it in the presence of *three*

nesses, shall give or appoint the same: *And* in default of and until such gift or appointment shall be made and take effect, the said premises shall be *In trust* for the said [*de-*

and in default of appointment,

in trust for devisee in fee.

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witnesses, but directed it to be written out fairly, and became delirious before it was returned, it was held sufficient, and the trustees were decreed to surrender accordingly. *Burkitt* v. *Burkitt*, 2 Vern. 498. This was a devise of an equitable copyhold estate, (as to which *vide ante*, 530, (*a*),) but (as *æquitas sequitur legem*) it seems that the principle of the decision is equally applicable to a will of a legal copyhold estate, since the above statute.

Any will received by the ecclesiastical Court will pass copyholds: therefore instructions for a will are sufficient.

In *Carey* v. *Askew*, 2 Bro. C. C. 59, Lord *Kenyon*, Master of the Rolls, said, "It has been held, that a will, received by the ecclesiastical Court, will govern the surrender of a copyhold." 1 Cox, 244, *S. C.* and S. P. In that case C. by his will devised all his freehold and copyhold estates to his two daughters, A. and M., and all other daughters that he might thereafter have, as tenants in common in fee. He had afterwards another daughter L. He then gave directions for another will, by which he gave all his real estates to his two eldest daughters, and a sum of 15,000*l.* to his daughter L. The attorney took minutes of this second will in writing; but before it was prepared the testator died. These minutes were proved in the spiritual Court as a testamentary paper. His Honour held, first, that this paper being proved in the spiritual Court, it was sufficient to pass the copyhold estate: and secondly, but that it was so totally void as to the freehold, that it would not put L. to her election under which will she would take, and she would therefore take her share of the freeholds, under the first will, as well as the 15,000*l.* under the second.

A will to direct the uses of a surrender of a copyhold, or of a customary estate passing by surrender, is not within the statute of frauds, and need not be signed, unless such signature be required by the terms of the surrender to the use of the will.

So in *Doe* on the demise of *Cooke* and wife v. *Danvers*, 7 East, 299, the estate appeared, by a case reserved at the trial, of ejectment, for the opinion of the Court of King's Bench, to be holden of the manor of Stebanheath, otherwise Stepney, in Middlesex, by copy of court roll (but not *ad voluntatem domini*), and to pass by *surrender* and admittance, and to have been leased under a previous licence from the lord; and it also appeared to have been surrendered by the late owner, to the uses of her will. And the Court ruled, that it being so circumstanced, whether held *at the will of the lord* or not, *the freehold was in the lord*, and not in the tenant; and that, with respect to all the questions arising in the case, it was to be taken and considered as copyhold.

The Court had entertained a doubt how far the will could be considered a will in writing under the terms of the surrender; and whether, under the 7th & 9th sections of the statute of frauds, the will must not be signed by the party, as thrown out by Lord *Kenyon* in *Doe* d. *Tempest* v. *Dancer*, (1796), and according to what is reported to have been said by Lord *Hardwicke*, in *Tuffnell* and *Page*, "that, when such will was in writing,

Testatum. Covenant by heir for further assurance.

visee], his heirs and sequels in right. NOW THIS INDENTURE WITNESSETH, that the said [*heir*], in compliance with the intention of the said [*testatrix*], in her

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and signed by the party, that was sufficient." But they now expressed themselves satisfied, that a will to direct the uses of a surrender of a copyhold, or of a customary estate *passing by surrender*, was not within the statute of frauds, and need not be signed, unless such signature be required by the terms of the surrender to the uses of the will; and added, that, although they thought it would have been the sounder construction to have holden that copyholds were comprised in the general words of the 5th & 6th sections of the act, "all devises and bequests of any lands or tenements;" yet it was a settled point, that the lands pass by the surrender and will taken together, as if the devisee's name was inserted in the surrender, and that they do not pass by the will: that the 7th section, requiring declarations or mentions of trusts of land to be in writing, signed by the party enabled to declare the trust, or by his will; and the 9th section, requiring all grants and assignments of trusts to be also in writing, signed by the party granting or assigning, or by such last will or devise, did not extend to surrenders of copyhold or customary estates, but referred only to such will as the statute recognized, viz. a will attested by three or four witnesses; a will of such lands not being a creation or declaration, or a grant or assignment of a trust. And, as to the question which had arisen, whether the will stated in the case was to be considered a will in writing, the Court (refering to 1 And. 34; 3 Leon. 79; 2 Keb. 128; *Carey* and *Askew*, 2 Bro. Rep. and a note to *Wagstaff* v. *Wagstaff*, 2 P. W. 259, (1),) also ruled, that the instrument in question, which was the written instructions for a will disposing of the above customary estate to the lessor of the plaintiff, and which had been pronounced as the will of the testator by the Prerogative Court, was a will in writing within the terms of the surrender; and judgment was therefore given for the plaintiff.

As to wills of copyholds by parol.

Mr. Watkins says, 1 Cop. 130, it should seem that a will by *parol* only would be sufficient for this purpose. A will by *parol* was good as to lands *devisable* by custom before the statute of frauds. See Co. Litt. 111 a, (3): and in the old writ of *ex gravi querela*, the custom was alleged generally, "to devise by last will." It does not seem probable that a will in writing should be required of a burgess or villein, who were not permitted even to have their children taught to read, without a license from the lord (see Paroch. Antiq. 401), till they were enabled by statute 7 Hen. 4, c. 17, An. Dom. 1405. The surrender of a copyhold is made "to such uses as A. B. shall by his last will appoint:" now I know of no law which says, that such last will must be in writing. It has been noticed above, that, where lands were devisable by custom, such devise need not be in writing: and the statutes of Henry the Eighth and Charles the Second,

said will expressed, doth hereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree, to and with the said [*devisee*], his heirs and assigns, that

BY HEIR OF DEVISE BY EQUITABLE TENANT IN TAIL OF COPYHOLDS.

relative to wills, do not embrace a will of copyholds. If, therefore, neither the general custom, nor a positive law, nor the particular surrender, require such will to be in writing, what reason can be given why a will by *parol* should not be good? *Quære.* Whether the 19th section of the 29 Car. 2, c. 3, relative to nuncupative wills, does not extend to copyholds, it being general.

However, if a particular mode of executing a will of copyholds be prescribed, and certain ceremonies required by the surrender, such mode must be pursued, and such ceremonies observed, and the particular directions must be complied with as to such will; for, otherwise, it will not be an execution of the power.

Where there is a surrender to the use of a will, the will, as to form, must pursue the directions of the surrender.

In *Hussey* v. *Grills*, Ambl. 301, there was no evidence that there could be in the particular manor a surrender of a customary freehold to the use of a will: and it was agreed that there never was any such. The question was, whether the trust of a customary freehold shall follow the rules as to copyholds? Lord *Hardwicke* said, "the foundation of the determinations as to copyholds is, that the party may dispose by surrender and will. As there is no method of passing the legal estate of these customary freeholds in this way, there is no reason to hold them out of the statute of frauds; and as the legal estate is not, so is not the trust. So, in the above case of *Doe* v. *Danvers*, 7 East, 299, the Court appear to have made a distinction, as to the applicability of the statute of frauds, between a devise of customary lands passing by *deed* and admittance, and a will of the like lands passing by *surrender* and admittance. It seems clear, that customary lands passing by *deed* and admittance, are within the statute of frauds, 29 Car. 2, c. 3, s. 5, and so the late Mr. Watkins appears to have thought. 1 Watk. Cop. 131, (*t*). However, Mr. Scriven appears to be of a contrary opinion. 2 Scriv. Cop. 640-1.

A devise of customary freeholds, where there is no custom to surrender to the use of a will, must be according to the statute of frauds, whether it be of the legal or equitable estate.

(C) Before the above act, if a husband had made a surrender of his own copyhold lands to the use of his will, and had afterwards made a will pursuant to the surrender, as the will took effect by relation to the surrender, the claim of the widow to free-bench would have been thereby defeated. 2 Watk. Cop. 74. Therefore, since the above act, where it has been the custom of a manor to pass copyholds by a surrender, and a will in pursuance thereof, a will alone will be sufficient to defeat the wife's right and title to free-bench.

Where, by the custom, copyholds pass by surrender and a will pursuant thereto, a will, since the act, defeats free-bench:

[It has been decided that this statute extends to surrenders *in form* only, and not to those which are made for purposes other than that of merely giving effect to the will; thus, where copyhold lands were devisable by

Act only extends to surrenders *in form.*

BY HEIR OF DEVISE BY EQUITABLE TENANT IN TAIL OF COPYHOLDS.

he the said [*heir*], and his heirs, and all and every other person and persons having or lawfully claiming, or who shall or may hereafter have or lawfully claim any estate, right, title, interest, or incumbrance, of, in, to, or out of the said two messuages, &c., (*for further assurance of copy-*

[*539] **hold, ut ante,* Vol. 1, p. 575). AND THIS INDENTURE FURTHER WITNESSETH, (*add covenant from the heir for the quiet enjoyment of the devisee, his brother.*) AND THIS INDENTURE FURTHER WITNESSETH, (*add covenant from the devisee for the quiet enjoyment of the heir of the premises devised to him*). IN WITNESS, &c.

Second testatum. Covenant by heir for quiet enjoyment by devisee.

Third testatum. Covenant by devisee for quiet enjoyment by heir of lands devised to him.

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femes covertes, they surrendering them to the use of their will, and previously to making such surrender being examined apart from their husbands, it was held that the will without the surrender was inoperative, as the private examination was intended for the protection of married women, which protection it was not the design of the legislature to take away. *Doe* d. *Nethercote* v. *Bartle,* 1 Dowl. & Ryl. 81, *S. C.* 5 Barn. & Ald. 492. And see 1 Jarm. Pow. Dev. 46, n].

But not where the customary mode is to devise without a surrender.

However, as to a devise good by special custom, *without a surrender* to the use of a will, a husband cannot defeat the claim merely by *devise;* as the devise cannot take effect *till his decease,* when the free-bench attaches. The above act only extends to cases where by the custom copyhold estates pass by will declaring the uses of surrenders made for that purpose. [As to the incidental operation of the statute upon some questions of construction, see Jarman on the Construction of Devises, vol. 2, p. 122.]

BY NEXT OF KIN OF PAYMENTS BEFORE LEGACIES VESTED.

CONFIRMATION *by the Testator's next of Kin of Payments made to the Legatees under his Will, whereby he gave his Residuary Personal Estate to such of his Nephews and Nieces as should be living when the Youngest came of Age; and Consent to the Payment of the Residue when the Youngest Child shall come of Age.*

Exordium. Recital of will,

TO ALL TO WHOM THESE PRESENTS SHALL COME, [*next of kin*], of &c., spinster, *sendeth greeting.* WHEREAS

BY NEXT OF KIN OF PAYMENTS BEFORE LEGACIES VESTED.

[*testator*], late of &c., deceased, made his last will and testament in writing, bearing date &c., and thereby, after giving several pecuniary legacies, gave and bequeathed all the residue of his personal estate and effects unto his nephews and nieces, J. C. T. and M. C. children of his cousin J. C., of &c., after the youngest of them should attain the age of twenty-one years, to be equally divided amongst them, or such of them as should be then living: *And* ap-*pointed J. H. and H. J. executors of his said will: *And* soon afterwards departed this life, without altering or revoking the same. And whereas the said J. H. and H. J., immediately after the decease of the said [*testator*], accepted the said executorship, and afterwards duly proved the said will. And whereas the said J. C., at the time of the making of the said last will, had only three sons living, (to wit) J., C., and T., and only one daughter, named J., since intermarried wit W. T., of &c., being the same person meant and described in the same will by the name of M. C. And whereas the said J. T. being a minor under the age of twenty-one years, it is apprehended that neither she, nor any of them the said J. C., C. C., and J. C. the son, have as yet acquired any vested right or interest in or to any share of the said residuary part of the personal estate of the said [*testator*]; nevertheless the said H. J., at the pressing instance and request, and by and with the mutual consent of the said J. C., C. C., T. C., and W. T. and J., his wife, hath some time since, by and out of the said residuary part of the personal estate of the said [*testator*], paid to the said [*legatees*], and W. T. and J. his wife, the sum of one thousand pounds, in the shares and portions following, (that is to say,) [*state the shares paid to each*]: *And* at the like instance and request, and with the like mutual consent of the same parties, the said H. J. hath this day, out of the said residuary part of the personal estate of the said [*testator*], paid to the said [*legatees*], and W. T. and J., his wife, the further sum of one thousand pounds, in the shares and portions following: that is to say; [*state the shares*]. And whereas the said [*next of kin*], (who as being the only next of kin to the said [*testator*] would, by virtue of the statute of distributions of intestates' es-

whereby testator gave his residuary personal estate to such of his nephews and nieces as should be living when the youngest came of age: appointment of executors: death of testator: proof of will:

[*540]

that a niece called Mary in the will was named Jane:

that Jane being an infant, none of them have a vested interest, yet that executor hath advanced monies to them:

that testator's next of kin who would be entitled to his undisposed of person-

BY NEXT OF KIN OF PAYMENTS BEFORE LEGACIES VESTED.

alty, approves of the monies being advanced by the executor.

tates be entitled to such part of his personal estate as might be undisposed of by his said will,) is well satisfied that it was the intention of the said [*testator*], by his said will, to dispose of the residue aforesaid of his personal estate in favour and for the benefit of the said four children of the said J. C., or of such of them as should be living as and when the said J. T., the youngest of the same children, should attain the age of twenty-one years, in equal shares; and that if she should die before her attaining that

[*541] *age, in that case the same personal estate should go in equal shares to the said three sons of the said J. C., the father, or to such of them as should be in being at the time when the said J. T., if living, would have attained that age: and the said [*next of kin*] is very desirous to do justice to that intention, and by every reasonable act to establish the disposition made of the personal estate of the said [*testator*] by his said last will, as hereinbefore explained; and to prevent, as much as in her power lies, any prejudice or inconvenience that might otherwise ensue to the said H. J. on account of his having paid the said several sums of 1,000*l.*, and 1,000*l.*, to the persons and in manner hereinbefore mentioned, and before the time by the said will appointed for the payment thereof. To THESE ENDS AND PURPOSES, THEREFORE, BE IT KNOWN, that the said [*next of kin*] doth hereby acknowledge and declare, that the said sums of 1,000*l.* and 1,000*l.* were so paid by the said H. J., out of the said residuary part of the personal estate of the said [*testator*], to the persons, and in the shares and portions hereinbefore mentioned, with the knowledge and approbation of the said [*next of kin*]; *And* so far as she lawfully may, she doth hereby ratify and confirm the same payments; *And* she doth hereby give her consent that the said H. J. and J. H., or either of them, do and shall, on the said J. T. attaining the age of twenty-one years, pay the remaining surplus of the said personal estate to the said J. C., C. C., T. C., and J. T., or to such of them as shall be then living, in equal shares; and if the said J. T. shall die before she shall attain that age, then that the said H. J. and J. H., or either of them, do and shall pay the said remaining surplus of the said personal estate in

Testatum. Admission that the monies have been advanced:

confirmation thereof:

consent to the payment of the residue when the youngest child shall come of age.

equal shares to the same [*legatees*], or to such of them as shall be in being at the time when the said J. T., if living, would have attained the age of twenty-one years. IN WITNESS, &c.

BY NEXT OF KIN OF PAYMENTS BEFORE LEGACIES VESTED.

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CONFIRMATION *of the Title of a Purchaser of a* COPYHOLD *Estate, where the Title was derived under a Surrender by a married Woman alone, without her Husband, to the use of herself for Life; Remainder to her Husband in Fee, with an intended Shifting Use in Fee, which failed of Effect; the Confirmation being by a* RELEASE *by the Heir of the Wife to the Purchaser in Fee, according to the Custom of the Manor.*

BY HEIR OF COPYHOLDS SURRENDERED BY A WOMAN WITHOUT HER HUSBAND.

TO ALL TO WHOM THESE PRESENTS SHALL COME, [*heir*], of &c., *sendeth greeting*. WHEREAS N. S., of &c., and T. L., of &c., did, on the —— day of —— last, surrender all and every the copyhold messuage or tenement, with the barns, stables, hay-house, yards, orchards, lands, meadows, pastures, feedings, ways, waters, commons, hereditaments, and appurtenances thereunto belonging, called or known by the names of [B.] Farm, and [B.'s], containing about —— acres, be the same more or less: *And* all the parcel or parcels of copyhold land, called [M.] Land, and [B.] Land, containing about —— acres, be the same more or less, situate, lying, and being in the parish and manor of W., in the county of ——, or in some other parish or parishes thereunto near or next adjoining, into the hand or hands of the lord or lords of the said manor or manors whereof the said copyhold premises are parcel, according to the custom of the same manor or manors, *To the use* of [*purchaser*], of &c., his heirs and assigns for ever; *And* he hath been admitted tenant to the said copyhold or cus-

Exordium.

Recital of copyhold surrender, to the use of a purchaser:

purchaser's admission,

tomary messuage, lands, hereditaments, and premises, in pursuance of, and according to the true intent and meaning of such surrender. And whereas the said messuage, lands, and hereditaments, were formerly the inheritance of M. S., of &c., deceased, and the title of the said [*purchaser*] is derived under a surrender by her to the use of herself for her life, with remainder to the use of her husband J. S. in fee, with a limitation over in an event which failed of effect (*a*), namely; in case the said M. S. should survive the said J. S. her husband, since deceased. And whereas the said J. S. did not join in the surrender so made by his wife (*b*) as a surrendering party, and on that account it has been deemed advisable that a release should

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that purchaser's title is derived under a surrender by a married woman, to the use of herself for life, remainder to her husband in fee, with an intended shifting use (*a*) in fee, which failed of effect:

that husband did not join in surrender as a party, and there-

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(*a*) The whole fee being previously disposed of, this intended shifting use, in a copyhold, could not take effect. *Vide ante*, p. 523—527.

Husband and wife may together surrender her copyhold lands;

(*b*) Husband and wife may, together, surrender the wife's copyhold lands; she being, on such surrender, examined apart from her husband by the steward, as to her voluntarily doing it. Gilb. Ten. 277; 1 Watk. Cop. 63.

but she cannot alone, so as to bind her husband.

But as the husband becomes, on marriage, entitled to the profits of the wife's copyholds during her life, and often by custom during his own, it is said, that it would be unreasonable that the wife should be suffered to deprive him of them by force of a particular custom, without his consent: it has, therefore, been determined, that a custom for a feme covert to surrender without such consent, cannot be supported; because "it is contrary to law and the policy of the nation, and tends to make wives independent of their husbands." *Stephens* v. *Tyrell*, 2 Wils. 1. But see *Compton* v. *Collinson*, 1 H. Bla. 342, 343; *Taylor* v. *Phillips*, 1 Bro. C.C. 229; 2 Ibid. 23.

However, in the above instance, the scruples of the gentleman who advised the above deed, appear to have been carried to a great length. The object of the rule is to protect the husband from being defeated of a life estate by his wife's alienation: now, in the above case, the surrender gave him a copyhold estate of inheritance after his wife's death. The rule was adopted for his benefit; when it is violated, he is the only person who is injured, or who can complain. But he will not complain; because he has an estate of inheritance instead of an estate for life. His concurrence in the above surrender, it seems, must necessarily be presumed, because it was for his benefit. Probably he was one of the homage at the same Court.

In the case of *Compton* v. *Collinson*, 1 H. Bla. 341, it was held that a surrender of a copyhold by a married woman without her husband, would bar her heir.

be obtained from the heir-at-law of the said M. S. of all right, title, and interest in and to the said messuage, lands, *and hereditaments, for the purpose of confirming the said title of the said [*purchaser*] in and to the same messuage, lands, and hereditaments. AND WHEREAS the said [*heir*] is the son and heir-at-law of R. L., late of &c., deceased, who was the elder brother of the said M. S., and as such he the said [*heir*] is the nephew and heir-at-law of the said M. S.: AND the said [*heir*] is willing, and hath consented and agreed to make and execute the release hereinafter contained. NOW KNOW YE, AND BY THESE PRESENTS IT IS WITNESSED, that, for confirming the title of the said [*purchaser*], and his heirs and assigns, in and to the said copyhold messuage, lands, hereditaments, and premises; and in consideration of ten shillings of lawful money of Great Britain and Ireland to the said [*heir*] well and truly paid by the said [*purchaser*], immediately before the execution of these presents, the receipt whereof is hereby acknowledged; *He* the said [*heir*] *hath* remised, released, and for ever quitted claim; and by these presents *doth*, for himself, his heirs, executors, and administrators, fully and absolutely remise, release, and quit claim to the said [*purchaser*], his heirs, executors, administrators, and assigns, ALL THAT AND THOSE the copyhold messuage, lands, tenements, hereditaments, and premises whatsoever, which have been surrendered to the use of the said [*purchaser*], his heirs and assigns as aforesaid, and every part and parcel of the same, with the appurtenances: AND all the estate, right, title, interest, claim, and demand whatsoever, at law and in equity, of him the said [*heir*], of, in, and to, out of, and upon, the same messuage, lands, hereditaments, and premises, or any of them, or any part or parcel of the same, with their rights, members, and appurtenances: TO THE INTENT that the same messuage, lands, hereditaments, and premises may be, and be deemed, the absolute property of the said [*purchaser*]: TO HOLD to him, his heirs and assigns for ever, at the will of the lord of the said manor, and according to the custom of the same manor; by and under the rents, suits, and services for the same messuage, lands, hereditaments, and premises due and of right accustomed to be paid, rendered, and per-

BY HEIR OF COPYHOLDS SURRENDERED BY A WOMAN WITHOUT HER HUSBAND.

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fore a release by way of confirmation from her heir-at-law, has been deemed advisable:

of heirship:

and that heir is willing to release.

Testatum.

Release by heir.

Parcels.

All the estate, &c.

To the intent that lands may be the absolute property of purchaser.

Habendum to purchaser in fee, according to the custom of the manor, under the rents, &c.

and discharged from all right of heir.

formed; AND discharged of and from all estate, right, title, and interest, claim and demand whatsoever, of him [*545] *the said [*heir*], of, in, to, out of, or upon, the same messuage, lands, hereditaments, and premises, or any of them. IN WITNESS, &c.

BY ONE OF THREE TRUSTEES, WHERE TWO ONLY HAD BEEN PARTIES TO A LEASE.

CONFIRMATION *of a* LEASE *by One of Three Trustees, where a Testator gave Leasehold Lands to Three Trustees, upon Trust to underlease so much as he should not have leased, Two only of whom having been Parties to a Lease, and doubts having arisen, whether Two of the Trustees were alone competent to make the Lease; therefore the other consented to confirm; and which is accordingly done by Indorsement on the Lease.*

Exordium.

Recital of will, whereby testator gave leasehold lands to three, upon trust, to underlease so much as he should not have leased; two of whom only are parties to the within lease:

TO ALL TO WHOM THESE PRESENTS SHALL COME. [*Confirmor*], of &c., *sendeth greeting*. WHEREAS the within-named [*testator*], by his last will and testament in writing, bearing date on or about the —— day of ——, 18—, gave and bequeathed *All* his leasehold lands, held by virtue of leases from [*ground landlord*], of &c., and situated in ——, in the parish of ——, in the county of ——, unto the within-named [*lessor*] and [*other lessor*], and the said [*confirmor*], their executors and administrators, *To hold* the same unto the said [*lessors*] and [*confirmor*], their executors and administrators, for all such estate and interest as he, the said [*testator*], had therein, *Upon trust*, as soon as conveniently might be, to let, set, or demise the said lands, and such parts thereof as he the said testator should not have so let, set, or demised before his death, in such parts, shares, and proportions as they might think proper, *Upon trust*, and for divers purposes expressed and declared in and by his said

will; *And the said* testator appointed the said [*two lessors*] and [*confirmor*] executors of the same will. And whereas the said [*testator*] departed this life [on or about the —— day of ——, 18—,] without having altered or revoked his said will: *And* the said [*two lessors*] and [*confirmor*], after the death of the said [*testator*], and on or about the —— day of ——, 18—, duly proved the same will in the Prerogative Court of the Archbishop of Canterbury, and obtained letters of probate of the same. And whereas doubts have arisen whether the said [*two lessors*] were alone competent to make the lease contained in the within-written indenture, without the concurrence of the said [*confirmor*]; and the said [*confirmor*], as far as he is interested, at law or in equity, is willing, and hath consented to execute the lease or confirmation hereinafter contained. NOW KNOW YE, AND THESE PRESENTS WITNESS, that the said [*confirmor*], for obviating all doubts of the validity of the within-written indenture of lease, for want of his concurrence in the same, and for the considerations expressed in the within-written indenture, and for supplying the defects, if any, in the same indenture, or the lease thereby made, for want of the concurrence of the said [*confirmor*] in the same; and in consideration of ten shillings of lawful money of Great Britain, to him the said [*confirmor*] in hand well and truly paid by the within named [*lessee*], at or before the execution of these presents, the receipt whereof is hereby acknowledged; the said [*confirmor*], by way of further assurance, and as far as he lawfully may or can, *hath* demised, leased, and also ratified and confirmed, *And* by these presents *doth* demise, lease, ratify, and confirm unto the said [*lessee*], his executors, administrators, and assigns, All those the piece or parcel of ground, and two brick messuages or tenements, and other erections and buildings and premises comprised in the within-written indenture, and thereby demised to the said [*lessee*], or expressed or intended so to be. (*Except* as in the same indenture of lease is excepted). To have and to hold the said piece or parcel of ground, &c., and all and singular other the premises hereby demised or confirmed, or intended so to be, and every part and parcel of the same, with the appur-

and appointed them executors.

Death of testator:

proof of his will:

that doubts have arisen whether two of the trustees were alone competent to make the lease; and therefore the other trustee consents to confirm.

Testatum.

demise and confirmation of

parcels.

Habendum for the residue of the within mentioned term:

BY ONE OF THREE TRUSTEES, WHERE TWO ONLY HAD BEEN PARTIES TO A LEASE.

tenances (except as aforesaid), unto the said [*lessee*], his executors, administrators, and assigns, henceforth, for and during all the residue of the time of the within-mentioned term of eighty years, which is now to come and unexpired: *In confirmation*, and for the purposes of giving effect to the same term; and also for supplying any defect in the same term, or in the within-written indenture of lease, for want of the concurrence of the said [*confirmor*] therein, as one of the granting or leasing parties jointly with the said [*two lessors*]: *Subject nevertheless* to the rents reserved, and to the covenants, conditions, and agreements expressed and contained in the said indenture, by or on the part of the said [*lessee*], his heirs, executors, administrators, and assigns, and which are henceforth to be paid, rendered, observed, performed, and kept for or in respect of the thereby demised premises. AND THE SAID [*lessee*] doth hereby grant to the said [*confirmor*], his executors, administrators, and assigns, that the rents reserved in the within-written indenture of lease shall henceforth be payable and paid to the personal representatives, for the time being, of the said [*testator*], or their assigns; and that the covenants, conditions, and agreements therein contained, shall be observed, performed, and kept in the same or the like manner as if the said [*confirmor*] had joined in the within-written indenture of lease, and the grant and demise thereby made; and the rent thereby reserved, and the covenants, conditions, and agreements therein contained on the part of the said [*lessee*], his executors, administrators, and assigns, had been entered into to and with the said [*two lessors*] and [*confirmor*], their executors, administrators, and assigns. AND THE SAID [*lessee*] doth hereby for himself, his heirs, executors, administrators, and assigns, covenant with the said [*confirmor*], his executors, administrators, and assigns, that he the said [*lessee*], his executors, administrators, or assigns, shall or will pay the said rent, and observe and perform the said covenants, conditions, and agreements accordingly. (*Add covenant by confirmor, that he has not incumbered, ut ante*, Vol. 2, p. 531, *mutatis mutandis*.) IN WITNESS, &c. (*ut ante*, Vol. 2, p. 507.)

Subject to the rents and covenants contained in the lease.

Covenant by lessee with confirmor, that rents reserved, and covenants contained in lease, shall be paid and performed in the same manner as if confirmor had joined in lease;

and that lessee will pay and perform same accordingly.

Covenant by confirmor, that he has not incumbered.

CONFIRMATION *of a Lease by the Lessor, who had not the Legal Estate when he executed the Lease, but who subsequently acquired it.*

OF LEASE BY LESSOR, WHO SUBSEQUENTLY ACQUIRED LEGAL ESTATE.

THIS INDENTURE, made the —— day of ——, 18—; BETWEEN the within-named [*lessor*], of the one part, and the within-named [*lessee*], of the other part. WHEREAS, for the purpose of removing all doubts whether the term granted by the within-written indenture, is a term of legal or equitable estate, the said [*lessor*], in whom the legal estate of inheritance is now vested, hath consented and agreed to make and execute the demise and confirmation hereinafter contained. NOW THIS INDENTURE WITNESSETH, that, in pursuance and in exercise of every power and authority, powers and authorities, enabling the said [*lessor*] in this behalf, by way of confirmation or further assurance, as far as these presents can operate by confirmation, and, as far as these presents cannot operate by confirmation, then by way of appointment or demise, *He* the said [*lessor*] *hath* directed, limited, and appointed, and also granted, demised, and confirmed; *And* by these presents *doth* direct, limit, and appoint, and also grant, demise, and confirm to the said [*lessee*], his executors, administrators, and assigns, ALL THAT plot, piece, or parcel of land, messuage, or dwelling-house and buildings, liberty or privilege, hereditaments and premises, mentioned and comprised in the within-written indenture, and thereby demised, or expressed or intended so to be, and every part and parcel of the same, with the appurtenances. TO HAVE AND TO HOLD the said plot, &c., hereby demised or confirmed, or otherwise assured, or intended so to be, and every part and parcel of the same, with the appurtenances, * unto the said [*lessee*], his executors, administrators, and assigns, henceforth for and during all so much, and such part of the time of the term granted, or intended to be

Parties.

Recital, that, in order to remove all doubts whether a term is legal or equitable, the lessor, in whom the legal estate is now vested, agrees to confirm the lease.

Testatum.

Appointment, grant, and demise of

Parcels.

Habendum for residue of term;

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OF LEASE BY LESSOR WHO SUBSEQUENTLY ACQUIRED LEGAL ESTATE.

granted by the within-written indenture, as is now to come and unexpired: SUBJECT *nevertheless* to the same or the like rent as was reserved by the within-written indenture, and to be payable in the same manner, or the like manner, and on the same days, as that rent was made payable: *And subject* to the same or the like covenants, provisoes, conditions, or agreements, as were or are contained in the same indenture on the part of the said [*lessee*], his heirs, executors, administrators, or assigns, to be paid, done, observed, and performed. AND THE SAID [*lessee*] doth by these presents, for himself, his heirs, executors, administrators and assigns, covenant and agree with the said [*lessor*], his heirs and assigns, that he the said [*lessee*], his heirs, executors, administrators, or assigns, shall or will henceforth, from time to time, during the continuance of the term hereby granted or confirmed, or intended so to be, well and truly pay, satisfy, and discharge, the yearly rent of —— pounds —— shillings, mentioned in, and reserved, or intended to be reserved, by the within-written indenture, and by these presents, when and as the same rent shall henceforth become due and payable: *And* from time to time, during the continuance of the same term, observe, perform, fulfil, and keep, all and singular the covenants, stipulations, and agreements, expressed and contained in the within-written indenture, or the counterpart thereof; and which by and on the part and behalf of the said [*lessee*], his executors, administrators, and assigns, are or ought to be henceforth observed, performed, and kept, for or in respect of the premises demised by the within-written indenture, or intended so to be, as far as the same covenants, conditions, and agreements, can be observed and performed with reference to the term granted or confirmed by these presents. AND THE SAID [*lessor*] doth by these presents, for himself, his heirs, executors, administrators, and assigns, covenant and agree with the said [*lessee*], his executors, administrators, and assigns, that he the said [*lessor*], his heirs, executors, administrators, or assigns, shall and will henceforth, from * time to time, during the continuance of the term granted or confirmed by these presents, well and truly observe, perform,

Subject to the rents reserved,

and the covenants contained in the lease.

Covenant by lessee to pay the rent,

and perform the covenants during the residue of the term.

Covenant by lessor to perform the covenants on his part during the residue of the term.

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fulfil, and keep all and singular the covenants, stipulations, and agreements expressed and contained in the within-written indenture of lease, or the counterpart thereof, and which, by and on the part and behalf of the said [*lessor*], his heirs, executors, administrators, and assigns, are henceforth, in respect of the said messuage and other the premises demised by the within-written indenture, to be observed, performed, and kept, as far as the same can be observed, performed, and kept, with reference to the term granted or confirmed by these presents. In witness, &c.

OF LEASE BY LESSOR, WHO SUBSEQUENTLY ACQUIRED LEGAL ESTATE.

CONFIRMATION *by way of* Covenant *by Three Vendors severally* to levy a Fine sur conuzance de droit, *at the Purchaser's Expense, to Uses to prevent Dower, of a Close described in the Lease and Release to be in a wrong Parish* (*a*): Covenant *by the Three Vendors severally, separate from the others, and only as to the Acts of Himself, his Heirs, &c., that the Covenantors respectively, and their respective Heirs, &c., will perform the Covenants in the Release, concerning the Close therein described, in the same manner as if the same Covenants had been concerning the Close herein comprised; so that the said Covenants may have the same Effect, as to the Close herein comprised, as if the same Close had been the Close described in the Release.*

COVENANT TO LEVY FINE, WHERE LAND HAD BEEN DESCRIBED IN WRONG PARISH.

This indenture, [of three parts], made the —— day of ——, in the year of our Lord 18—; * Between [*three vendors*], of &c., of the first part; [*purchaser*], of &c., of the second part; and [*trustee to prevent dower*], of &c., of the third part. Whereas by indenture

Parties.

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Recital of lease and release,

(*a*) See *Floyd*, demandant; *Simmons*, tenant, 2 Bing. 386.

whereby lands have been conveyed to the same uses, &c. as are herein contained.

of lease, bearing date on the day next before the day of the date of these presents, and indenture of release, bearing even date with these presents, [and being of three parts], and made, or expressed to be made, between the said [*three vendors*], of the first part; the said [*purchaser*], of the second part; and the said [*trustee to prevent dower*], of the third part; in consideration of the sum of —— hundred and —— pounds, to the said [*three vendors*] well and truly paid by the said [*purchaser*], *All that* close, piece, or parcel of ground, called or known by the name of G. Close, and further described as containing by estimation —— acres, more or less, and as situate, lying, and being in C. in the county of M , formerly in the tenure or occupation of J. L., afterwards of T. B., since of J. R., his under tenants or assigns, and now or late of T. B.: *And* all hedges, ditches, fences, pales, rails, waters, water-courses, profits, commodities, advantages, emoluments, and appurtenances whatsoever, to the said close or parcel of land, hereditaments, and premises belonging, or in any wise appertaining, have been conveyed, or otherwise assured by the said [*three vendors*] to divers uses, and upon divers trusts, and for divers ends, intents, and purposes, by the same indenture of release limited, expressed, and declared, of and concerning the same close and hereditaments, being the same uses, trusts, ends, intents, and purposes as are contained in these presents.

Recital that a close is better known by a modern than by an ancient description;

that the close is in the parish of K. and not in C.

And whereas the said close or parcel of land and hereditaments so released, or otherwise assured as aforesaid, were formerly called by the name of G. Close, but are now, and for many years past, have been better known by the name or description of L. Close, otherwise L. Shot. And whereas the said close, piece, or parcel of land, and hereditaments, are situate in the parish of K., in the said county of M., and not in the parish of C.

seisin of one of vendors and his ancestors for a great number of years:

And whereas the said [*one of the vendors*] and his ancestors have been in the possession or seisin of the said close, piece, or parcel of land, and hereditaments, and in the perception of the rents and profits thereof for —— years and upwards.

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that one of vendors is heir-at-law of persons successively seised:

*And whereas the said [*one of the vendors*] is the heir-at-law of the several persons who successively have been seised of the said close, piece, or parcel of land, and here-

ditaments, so released or otherwise assured as aforesaid. AND WHEREAS the said mistake in the name of the parish was not discovered until the said indentures of lease and release had been executed; and the mistake originated in describing a certain other close, called or known by the name of R. Close, and which is in the parish of C., as being in the parish of K., in describing the said close called G. Close, otherwise L. Close, otherwise L. Shot, to be in the parish of C., while the same is in the parish of K.; thus reversing the manner of the parishes. AND WHEREAS for the satisfaction of the said [*purchaser*], the said [*vendors*] have consented to levy a fine of the said close, piece, or parcel of land, now called or known by the name of L. Close, otherwise L. Shot, and to declare the uses of the said fine, in such manner as hereinafter mentioned, and to enter into the covenants hereinafter contained on their parts. NOW THIS INDENTURE WITNESSETH, *and it is hereby declared and agreed* by and between the parties to these presents, *And* each of them the said [*three vendors*] severally, separate, and apart from the others of them, doth hereby, for himself, his heirs, executors, and administrators, and as, to, and concerning only his own acts, deeds, and defaults, covenant, promise, and agree, to and with the said [*purchaser*], his heirs and assigns, in manner following: that is to say; that they the said [*three vendors*] respectively, shall or will, at the proper costs and charges of the said [*purchaser*], his heirs or assigns, as of Michaelmas Term now last past, or in or as and before the end of Hilary Term now next ensuing, acknowledge and levy unto the said [*purchaser*] and his heirs, before his Majesty's Justices of the Court of Common Pleas at Westminster, one or more fine or fines *sur conuzance de droit come ceo*, &c., with proclamations to be thereupon had and made, according to the form of the statute in that case made and provided, and to be engrossed and recorded according to the order and course of fines in such cases used and accustomed, of ALL THAT close, piece, or parcel of ground, with the appurtenances, * now commonly called or known by the name of L. Close, otherwise L. Shot, which said close contains by estimation —— acres (be the same more or less), and which

that mistake in name of parish was not discovered till lease and release had been executed:

that, for purchaser's satisfaction, vendors have consented to levy a fine of the close, to the uses, and enter into covenants hereinafter contained.

Testatum.

Covenant by three severally to levy a fine *sur conuzance de droit*, at purchaser's expense, of

Parcels.

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COVENANT TO LEVY FINE, WHERE LAND HAD BEEN DESCRIBED IN WRONG PARISH.

said close is situate lying, and being in the parish of K. in the county of M., and is bounded on the north by the public road leading from —— to ——, on the east and south by land sometime since purchased by the said [*purchaser*] of [A. B.], and now in the possession of the said [*purchaser*], or his tenants; and on the west, by a road leading from the said public road into the land so purchased by the said [*purchaser*] of the said [A. B.].

Declaration of the use of the fine.

And *it is hereby agreed* by and between the parties to these presents, as far as they respectively are interested, that the said fine or fines so as aforesaid, or in any other manner, or at any other time or times, levied, or to be levied [; and all and every other fine or fines, common recovery or recoveries, and other assurances whatsoever, at any time or times heretofore, and to be at any time, and from time to time hereafter, acknowledged, levied, suffered, made, and executed, of and concerning the said close and hereditaments hereinbefore described, or any of them, or any part thereof], by or between the said parties to these presents, or any of them, either alone, or jointly and together with any other person or persons whomsoever, or to which they, or any or either of them, is, or are, or shall or may be, parties or privies, or party or privy, shall be and enure, and shall be adjudged, deemed, expounded, construed, and taken to be and enure [and was and were meant and intended, and is and are hereby directed and declared, to be and enure; and the conuzee or conuzees named, and to be named, in the said fine or fines, and every of them, and his and their heirs, and all and every other person or persons respectively, to whom the said fine or fines, recovery or recoveries, and other assurances respectively, have or hath been, or shall or may be, levied, suffered, made, and executed, shall severally and respectively stand and be seised], *As to, for, and concerning* the said close, piece, and parcel of land and hereditaments, hereinbefore particularly mentioned, and in part described to be situate in the said parish of K., and every part and parcel of the same, with the appurtenances, To * THE USE of such person or persons, for such estate or estates, and for such interest or interests, by way of annuity, rentcharge, or otherwise, and in such parts, shares, and pro-

Uses to prevent dower.

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COVENANT TO LEVY FINE WHERE LAND HAD BEEN DESCRIBED IN WRONG PARISH.

portions, and upon such trusts, and for such ends, intents, and purposes, and charged and chargeable in such manner, and either absolutely or conditionally, and subject to such powers of revocation and of new appointment, and other powers, provisoes, conditions, restrictions, limitations, declarations, and agreements, as the said [*purchaser*], at any time or times, and from time to time, by any deed or deeds, to be sealed (*a*) and delivered by him in the presence of one, two, or more credible witness or witnesses, and attested by the same witness or witnesses, shall direct, limit, or appoint: *And*, in default of such direction, limitation, or appointment; and in the mean time, and from time to time, until the same shall take effect; and from time to time, subject to such uses, estates, trusts, charges, and interests, as shall have been directed, limited, or appointed by the said [*purchaser*], then To THE USE of the said [*purchaser*] and his assigns, for and during the term of his natural life: *And* from and after the determination of that estate, by any means, then To THE USE of the said [*trustee to prevent dower*], his heirs and assigns, during the natural life of the said [*purchaser*], *Upon trust* for, and for the sole benefit of, the said [*purchaser*] and his assigns; *And* to the intent that the present or any future wife of the said [*purchaser*] may not be entitled to dower: AND, from and after the determination of the estate hereby limited to the use of the said [*trustee to prevent dower*], his heirs and assigns, for the life of the said [*purchaser*], then To THE USE of the said [*purchaser*], his heirs and assigns for ever; and to, for, and upon, no other use, trust, intent, or purpose whatsoever. AND each of them the said [*three vendors*] severally, separate and apart from the others of them, doth hereby for himself, his heirs, executors, and administrators, and as to and concerning only the acts, deeds, and defaults of himself, his heirs, executors, and administrators, covenant, * declare, and agree, to and with the said [*purchaser*], his heirs and assigns, that they the said [*three vendors*] respectively, and their respective heirs, executors, and administrators, shall and will, on his and their parts, well

Several covenant by three, each as to the acts of himself, his heirs, &c.

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to perform the co-

(*a*) *Vide ante*, Vol. 2, pp. 502, 505, as to the word "*signed*." "Signed."

venants in the recited release, concerning the close therein described, in the same manner as if the same covenants had been concerning the close herein comprised;

and truly observe, perform, fulfil, and keep all and singular the covenants, stipulations, and agreements contained in the said indenture of release, bearing even date with these presents, of and concerning the close and hereditaments comprised in that indenture, or therein described, in the same or the like manner, and to all intents and purposes, as if the same covenants, stipulations, and agreements had been annexed to, or had been of and concerning the close and hereditaments comprised in these presents; *So* that the said covenants, stipulations, and agreements, or these presents, and the covenants herein contained, may have the same or the like effect, in application to the close and hereditaments comprised in these presents, as if the same close and hereditaments had been the close and hereditaments described in the said indenture of release bearing even date with these presents. In witness, &c.

so that the said covenants may have the same effect as to the close herein comprised, as if the same close had been the close described in the release.

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OF DEEDS DESTROYED BY FIRE.

CONFIRMATION *of Mortgage Deeds destroyed by Fire* (*a*).

Parties.

THIS INDENTURE, made the —— day of ——, 18—: Between F. W. and I. H. [*two trustees*] of

(*a*) Case for the opinion of Mr. Tidd.

An attorney or any other person is not answerable for deeds accidentally burnt while in his custody, unless they were wrongfully withheld from the owner.

Mr. A. B., an attorney and solicitor, and who practised as an agent in conveyancing, or conveyancer, had in his custody on the 1st October, 1813, deeds and writings of various denominations. One part of them left with him in the character of attorney, solicitor, or agent: not agent for another, as in the case of common law or equity, from country to town, but in his proper business, for preparing marriage-settlements, conveyances, and mortgages; for carrying sales into effect; for preparing contracts for sales, leases, and other business. Other part, on which he had liens for bills of costs and professional charges. Other part for which he was sole trustee, or trustee jointly with others. Other part consisting of deeds and writings, for which clients had sent or applied a short time previous to the 1st October, but which had not been sent. Others which remained in the office, belonging to clients and others, who had not sent for them, and upon which Mr. B. had no professional claim.

OF DEEDS DESTROYED BY FIRE.

&c., devisees in trust, named in the last will and testament of [*mortgagor*], late of &c., (deceased), of the first part; [*heir*], of &c., (the only son and heir-at-law, and also devisee for life, and executor named and appointed in and by the last will and testament of the said [*mortgagor*], deceased), of the second part; and [*mortgagee*], of the third part. WHEREAS certain indentures of lease and release, bearing date respectively the —— and —— days

Recital of indentures of lease and release.

On the 1st October a fire broke out, which destroyed nearly all the deeds and writings, and the greater part of Mr. B.'s bills of law charges, by which his means of making many discoveries were taken away.

The circumstances of the cause of the fire cannot be discovered; but is supposed to have arisen from a spark from a candle obscured among the papers, as the clerk, according to a usual caution, delivered his candle to a servant of the house. And it happened, that the office was distant from the house about fifty feet, being separated therefrom by a garden, planted with trees, and without any possible communication. The clerk left the office (as he supposed in perfect safety) at eight o'clock, and the fire was not perceived until near eleven that night.

In order to supply the defect of deeds and writings, it is at present conjectured, that it may be necessary to levy fines, execute deeds declaring uses, to pass private acts of parliament, and pursue other means to rescue the legal and equitable rights of the persons interested in the several estates to which the destroyed deeds had relation, and which of course will be attended with considerable expense.

Your opinion is desired, whether this is such a case as to make Mr. B. liable to the above expense, or any other consequential damages arising from the accident of the fire; whether the same be from actions of trespass, in ejectment, suits in equity, or any other means which adverse claimants might make use of, on their discovering that the deeds and writings concerning their supposed interests are destroyed.

OPINION.

"The rule of the law in cases of this nature is, that, if the person in whose custody the deeds and writings are deposited, take as much care of them as a prudent man would take of his own property, and they are notwithstanding burnt or destroyed by fire, he shall not be answerable for the consequences to the proprietor. I am, therefore, of opinion, there appearing to be no ground for charging Mr. B. or his clerk with any particular neglect, that this is not such a case as to make him liable for any expense, or other consequential damages arising from the fire, unless it

OF DEEDS DESTROYED BY FIRE.

of ——, in the year one thousand seven hundred and ——, were made and entered into by and between the said [*mortgagor*], deceased, and the said I. H., (as trustee for the said [*mortgagor*], of the one part, and the said [*mortgagee*] of the other part: AND which indentures, according to copies made and retained thereof, were in the words or figures, and to the effect, following: that is to say; *First*, the indenture of lease, as follows; "THIS INDENTURE made" &c., (*insert the lease, verbatim, to* "day and year first above written"). *And secondly*, the said indenture of release, as follows: that is to say; "THIS INDENTURE, made" &c., (*insert the release verbatim, to* "day and year first above written"). AND on which said indenture of release was indorsed a receipt for the said consideration money, or sum of —— thousand pounds, signed by the said [*mortgagor*]. AND the aforesaid indentures of lease and release, hereinbefore set forth, were duly executed by the said [*mortgagor*] and I. H. respectively, and the said receipt indorsed as aforesaid, was signed by the said [*mortgagor*], deceased, in the presence of and witnessed by R. W. of Lincoln's Inn, and S. B., then clerk to the said [*mortgagee*], who were the witnesses attesting the due execution of the same indentures respectively, and the signing the said receipt. AND WHEREAS another or further indenture was entered into and executed by and between the said [*mortgagor*], the father, and the said [*mortgagee*], (by indorsement on the said indenture of release): AND which further indenture was in the words or figures, and to the effect, following: that is to say; THIS

and which according to copies thereof were as follows;

Exemplification of lease for a year.

Exemplification of release.

Recital that receipt for consideration money, was indorsed on release; that lease and release were executed by mortgagor and trustee, and receipt signed in presence of R. W. and S. B.

Recital of indenture of further charge as follows:

Exemplification

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could be proved that he wrongfully withheld the deeds and writings, for which his clients had sent or applied previous to the time when it happened; in which case, as to such of the deeds and writings only, it might be held, that he is liable for the expenses that may be incurred, or damages arising in consequence of their not being delivered up when sent for†.

"W. TIDD.

"Temple, October 6th, 1813."

† The principle of the above opinion is equally applicable to any other person, as well as an attorney, who has the deeds of another in his custody. *Vide ante*, Vol. 1, p. 2, n. (*b*), *ad ultimum*.

INDENTURE, made" &c., (*insert the further charge verbatim, to* " day and year first above written"). AND WHEREAS the said last-mentioned indenture, being duly * stamped, was sealed and delivered by the said [*mortgagor*], party thereto (*b*),) in the presence of and attested by the said R. W. and S. B., and a receipt was at the same time given, and also signed by the said [*mortgagor*], for the sum of —— thousand pounds, the consideration in the said last-mentioned indenture, and witnessed by the same witnesses. AND WHEREAS the said [*testator*] departed this life on or about the —— day of ——, one thousand eight hundred and ——, having previously duly made and published his last will and testament in writing, (executed and attested as by law required to pass freehold estates), bearing date on or about the —— day of ——, one thousand eight hundred and ——; and thereby gave and devised all his freehold messuages, lands, tenements, and hereditaments, situate and being in the several counties of ——, or elsewhere, unto and to the use of his wife (since deceased), and the said [*two trustees*], and their heirs, *Upon trusts* for raising certain sums of money since raised and paid; *And* subject thereto, *In trust* for his son the said [*heir*] (party hereto), for life, without impeachment of waste; remainder to his first and other sons successively, in tail male; with remainders over, in the manner therein mentioned: *And* appointed his said wife and son executrix and executor of his said will. AND the said testator afterwards died, without revoking or altering his said will; whereupon the said [*heir*] the son, alone duly proved the same in the Prerogative Court of the Archbishop of Canterbury. AND WHEREAS the widow of the said testator is since dead, leaving the said [*two trustees*] her surviving: AND the said [*heir*] the son is married, and hath [——] his eldest son, now an infant, and two other children. AND WHEREAS default was made in payment of the said two several sums of —— thousand pounds and —— thousand pounds so lent and advanced to the said [*mortgagor*] the father, and secured by the said several indentures of mortgage, and further charge hereinbefore set forth, or intended so

of further charge.

Recital that further charge was executed by mortgagor in the presence of &c.

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Recital of mortgagor's death, and his will, devising his freehold lands.

In trust, after certain monies were raised, for heir for life; remainder to first and other sons, in tail male; with remainder over;

that heir is married, and hath three children: that default was made in payment of mortgage monies;

(*b*) The father and son were of the same Christian name.

OF DEEDS DESTROYED BY FIRE.

to be; whereby the estate and interest of the said [*mortgagor*], of and in the said mortgaged premises, became absolute *at law. And whereas the said indenture of mortgage, and the indenture by way of further charge, thereon indorsed, and the indentures of lease and release, bearing date respectively the seventh and eighth days of ——, one thousand seven hundred and ——, and the indenture of bargain and sale, bearing date the same eighth day of ——, therein recited and referred to, with other the title deeds of the said [*mortgagor*], deceased, to the aforesaid estate and hereditaments, were burnt, and nearly the whole thereof consumed or destroyed by the calamity of fire, which accidentally happened in and destroyed the office of the said [*mortgagee*], situate behind his dwelling-house, in, &c., on the night of the —— day of ——, now last past: *But* the aforesaid deeds or indentures of lease and release, and mortgage, and the said other indenture of further charge indorsed on the said indenture of release, are hereinbefore set forth from true copies retained thereof respectively, by and on the behalf of the said [*two trustees*] as trustees as aforesaid, and now remaining in the possession of their solicitors, Messrs. W. and B. of Lincoln's Inn, as they the said [*heir*] and [*two trustees*] respectively do hereby acknowledge and admit. And whereas the said two several sums of —— thousand pounds and —— thousand pounds still remain due and owing to the said [*mortgagor*] upon or under the said several indentures of lease and release, and mortgage, and indenture of further charge: And in consequence of the destruction of the same indentures respectively in manner aforesaid, he the said [*mortgagor*] hath applied to and requested the said [*two trustees*], as such trustees as aforesaid, and also the said [*heir*], party hereto, to acknowledge and admit the due execution and validity of the said indentures respectively; and that the above are true transcripts or copies thereof; which they have agreed to do. NOW THEREFORE THIS INDENTURE WITNESSETH, that, in pursuance of the said agreement, they the said [*two trustees*] (so far as they lawfully or equitably can or may as such trustees as aforesaid); and also the said [*heir*] (party hereto) as such heir-at-law and devisee as aforesaid, for

that the deeds here exemplified, and the other title deeds of mortgagor, were consumed by a fire, which accidentally happened in mortgagee's office:

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that the deeds herein exemplified are set forth from copies retained by the trustees' solicitors:

that mortgage monies are still due:

that mortgagee hath requested trustees and heir to admit the due execution and validity of the deeds.

Testatum. Trustees &c., admit that the deeds exemplified were to the effect hereinbefore set forth;

themselves severally and respectively, and for their several and respective heirs, executors, and administrators, *do*, *and each and every of them *doth* hereby admit and acknowledge, *That* the said hereinbefore recited indentures of lease and release and mortgage, and the said recited indenture of further charge, were to the tenor and effect, or in the words and figures hereinbefore set forth: AND that the same several indentures were respectively duly executed, and the receipts indorsed on the said indentures of release and further charge respectively, signed by the said [*mortgagor*], deceased, in the presence of, and attested by, credible witnesses: and that the above transcripts or copies of the same indentures and receipts respectively shall be allowed and admitted, or deemed and taken, as full and complete evidences thereof, and shall and may be acted upon; and all remedies and means pursued with regard thereto, both at law and in equity, in like manner and as effectually as if the said original indentures thereof had not been burnt or destroyed, any law, custom, or other matter or thing to the contrary thereof notwithstanding. IN WITNESS (*c*), &c.

OF DEEDS DESTROYED BY FIRE.

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and were duly executed, and the receipts indorsed, &c.

and that the above transcripts shall be evidence.

(*c*) Stamp 1*l.* 15*s.*, and progressive duty 1*l.* 5*s.*, as a deed "not otherwise charged." Stamp.

COVENANT.

COVENANT TO PAY MONEY BORROWED, AND INTEREST.

[COVENANT *by One with One for the* PAYMENT *of a* SUM *of* MONEY *lent, and* INTEREST. *(Variation, where Covenant is to secure a* DEBT ALREADY DUE; *also where it is the* JOINT *and* SEVERAL COVENANT *of more than one* (*a*)).

THIS INDENTURE, made the —— day of ——, 18—, BETWEEN [*borrower*], of &c., of the one part, and [*lender*], of &c., of the other part. WHEREAS the said [*lender*], has agreed to lend and advance to the said [*borrower*] the sum of —— pounds, at interest, on his entering into the covenant hereinafter contained (*b*). NOW THIS INDENTURE WITNESSETH that, in consideration of the sum of —— pounds, lent and advanced by the said [*lender*] to the said [*borrower*] at or immediately

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(*a*) These forms of covenant have been added by the present Editor, agreeably to a suggestion, *ante*, p. 470 *e*.

(*b*) Where the bond is given to secure a sum already due, vary the recital thus:

Variation where the covenant is to secure an existing debt.

"WHEREAS, the said [*debtor*] is now indebted under the said [*creditor*], by simple contract, in the sum of —— pounds, and the said [*debtor*] has consented and agreed, at the request of the said [*creditor*], to secure the payment of the said debt with interest, by entering into the covenant hereinafter contained; NOW THIS INDENTURE WITNESSETH, that, in consideration of the premises, the said [*debtor*] doth hereby for himself, his heirs, executors, and administrators, covenant," &c. *ut supra*.

COVENANT TO PAY MONEY BORROWED, AND INTEREST.

before the execution of these presents, the receipt whereof the said [*covenantor*] doth hereby acknowledge, and from the same doth release and discharge the said [*lender*], his heirs, executors, and administrators (*b*), He, the said [*borrower*], for himself, his heirs, executors, and administrators, doth hereby covenant and agree with the said [*lender*], his executors and administrators, that (*c*) he, the said [*borrower*], his heirs, executors, or administrators, shall and will, on the —— day of —— next, between the hours of twelve and two of the o'clock in the afternoon, at the Royal Exchange, in the city of London, pay, or cause to be paid, unto the said [*lender*], his executors or administrators (*d*), the sum of —— pounds, of lawful money of Great Britain and Ireland, with interest for the same, at the rate of *5l. per cent. per annum*, from the day of the date of these presents, without any deduction or abatement whatsoever. IN WITNESS, &c.

(*b*) If it is a joint and several covenant, say:

Variation where covenant is joint and several.

"They, the said [*borrowers*] do, for themselves, jointly, their heirs, executors, and administrators, and each of them doth for himself, severally, his heirs, executors, and administrators, covenant," &c.

(*c*) "They, the said [*borrowers*], or one of them, their, or one of their heirs, executors, or administrators, shall and will," &c.

(*d*) It is inaccurate to make a covenant for the payment of a sum of money in gross with the covenantee, his executors, administrators, *and assigns*, as is sometimes done, since a covenant is not assignable at law.

COVENANT TO SECURE ACCOUNT CURRENT TO BANKERS.

[COVENANT *by the* CUSTOMER *of a* BANKING-HOUSE *to secure the Balance for the Time being on an* ACCOUNT CURRENT. *(Variation where a* THIRD PERSON *joins in the Covenant as* SURETY).

THIS INDENTURE, made the —— day of ——, BETWEEN [*customer*], of &c., of the one part, and [*bankers*], of &c., bankers and co-partners, carrying on business under the firm or style of "A., B., & Co.," of the other part: WHEREAS the said [*customer*] has opened an account current with the said [*bankers*], as their customer, and has proposed and agreed, in order to secure any sum or sums of money which now is, or are, or shall hereafter become, due and owing from him to the said banking-house, in the course of such account, to enter into the covenant hereinafter contained (*a*). NOW THIS INDENTURE WITNESSETH that, in consideration of the premises, the said [*customer*] doth hereby for himself, his heirs, executors, and administrators, covenant and agree with the

(*a*) If a surety joins in the covenant, say—

Variation where surety joins.

"WHEREAS the said [*customer*] has opened a banking-account with the said [*bankers*], and in order to secure any sum or sums of money which may at any time or times hereafter become due and owing from him to the said banking-house in the course of such account, he has proposed and agreed that he and the said [*surety*], as his surety, shall enter into the covenant hereinafter contained. NOW THIS INDENTURE WITNESSETH, that, in consideration of the premises, the said [*customer*] and [*surety*] do hereby jointly, for themselves, their heirs, executors, and administrators, and each of them doth separately, for himself, his heirs, executors, and administrators, covenant and agree, that they the said [*customer*] and [*surety*], or one of them, their, or one of their heirs, executors, or administrators, shall," &c. *ut supra.*

COVENANT TO SECURE ACCOUNT CURRENT TO BANKERS.

said [*bankers*], their executors and administrators, in manner following: that is to say; That the said [*customer*], his heirs, executors, or administrators, shall and will well and truly pay or cause to be paid unto the said [*bankers*], or some or one of them, their, or some or one of their executors, or administrators, such sum and sums of lawful money of Great Britain and Ireland (*b*), as shall at any time, or from time to time hereafter, be due and owing from the said [*customer*], to the said [*bankers*], or any or either of them who for the time being shall be members or a member of the said banking-house, (notwithstanding the decease or retirement of any other or others of the said [*bankers*] from the said banking-house (*c*)), either alone or jointly with any partner or partners, or with the executors or administrators of any partner or partners who, together with the said [*bankers*], or any or either of them, may carry on the said business of a banker at ——, aforesaid, on the balance of the account current of the said [*customer*] with the said banking-house, by reason or in respect of any payments or advances made or to be made by the said [*bankers*], or any or either of them, as aforesaid, either alone or jointly with any such partner or partners, or the executors or administrators of any partner or partners, as aforesaid, unto or for the use, or on account of the said [*customer*], or for interest, discount, commission, and other usual bankers' charges, or otherwise by reason or in respect of the said business transacted and to be transacted by the said [*customer*] with the said banking-house, while the same shall continue to be carried on by the said [*bankers*], or any or either of them, either alone or in partnership with any person or persons, as aforesaid (*d*); and shall and will pay the said sum or sums of

(*b*) Where the money is secured by covenant only, as no *ad valorem* duty attaches, there is no occasion for limiting the sum secured, as in the case of bonds or mortgages.

(*c*) As to the expediency of introducing these words, *vide Weston* v. *Barton*, 4 Taunt. 673, *ante*, p. 238, 2nd ed.

(*d*) The terms of this covenant, it will be perceived, confine it to the firm, while one of the covenantees continues a partner, in which respect it differs from the bond, *ante*, p. 232. See some observations on bankers' securities, *post*, Vol. 5, p. 287.

COVENANT TO SECURE ACCOUNT CURRENT TO BANKERS.

money at the times and in the manner following: that is to say; the sum or sums of money already due and owing from the said [*customer*] at the expiration of six calendar months from the date hereof, or immediately on demand thereof, and the sum or sums of money hereafter to become due, as aforesaid, at the expiration of six calendar months after the same shall from time to time so become due, or immediately on demand thereof(*e*), without any deduction or abatement whatsoever (*f*). IN WITNESS, &c.

(*e*) By making the money payable alternatively in this manner, the inconveniences of being compelled to make a demand on the one hand, and of being compelled to wait the stipulated period, (unless in the case of its being impossible to make a demand), on the other are avoided.

Proviso that remedies against sureties shall not be affected.

(*f*) If the bankers hold any collateral securities, say—

"PROVIDED NEVERTHELESS, that nothing herein contained shall prejudice, or in any manner affect, any claim or remedy which the said [*bankers*] now have or hereafter may have upon or against any other person or persons, as a surety or sureties for the said [*customer*], or otherwise, in respect of any sum or sums of money now due or hereafter to become due from the said customer, as aforesaid, any rule of law or equity to the contrary notwithstanding."

As to the necessity and efficiency of a provision of this nature, *vide ante*, p. 195, n. (*b*). The precedents in the text may easily be adapted to cases where the money is to continue for a certain number of years, and the interest is payable, in the mean time, half yearly, or the principal and interest are payable by instalments, &c.; the variations applicable to which circumstances will be found in the mortgage precedents].

END OF THE THIRD VOLUME.

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